

## 21 Am. Jur. 2d Creditors' Bills Summary

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### [Correlation Table](#)

## Summary

### Scope:

This article discusses actions in equity by creditors to reach property or interests of a debtor which cannot be reached by execution or other legal process.

### Treated Elsewhere:

Attachment of property pending determination of merits of legal cause of action, see [Am. Jur. 2d, Attachment and Garnishment §§ 1 et seq.](#)

Bankruptcy proceedings and discharges, effect upon creditors' bills, see [Am. Jur. 2d, Bankruptcy §§ 1 et seq.](#)

Discovery of assets in aid of execution on judgment in civil action, see [Am. Jur. 2d, Executions and Enforcement of Judgments §§ 615 to 623.](#)

Fraudulent conveyances and the setting aside thereof, see [Am. Jur. 2d, Fraudulent Conveyances and Transfers §§ 1 et seq.](#)

Garnishment of wages or other indebtedness of judgment debtor to third person, see [Am. Jur. 2d, Attachment and Garnishment §§ 1 et seq.](#)

Marshaling assets, see [Am. Jur. 2d, Marshaling Assets and Inverse Order of Alienation §§ 1 et seq.](#)

Receiver, appointment of, other than in aid of creditor's bill, see [Am. Jur. 2d, Receivers §§ 11 to 79.](#)

Sequestration of property upon which party to action has claim of ownership or some other interest, see [Am. Jur. 2d, Sequestration §§ 1 et seq.](#)

Stay in bankruptcy of actions against debtor or against property of bankruptcy estate, see [Am. Jur. 2d, Bankruptcy §§ 1740 to 1810.](#)

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## 21 Am. Jur. 2d Creditors' Bills I Refs.

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

#### I. In General

[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

#### A.L.R. Library

A.L.R. Index, Creditors' Bills

West's A.L.R. Digest, Debtor and Creditor 11

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## 21 Am. Jur. 2d Creditors' Bills § 1

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### Creditors' Bills


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#### I. In General

### § 1. Definition

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#### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

A creditor's suit or bill is generally defined as an equitable proceeding brought by a creditor to enforce the payment of a debt out of property or interests of his or her debtor which cannot be reached by ordinary legal process.<sup>1</sup>

#### Observation:

The term “creditor's bill” is also used broadly to refer to certain other proceedings, including proceedings by creditors of insolvent corporations;<sup>2</sup> a bill brought by the creditors of a deceased person for the administration of his or her estate;<sup>3</sup> actions by creditors and claimants of a trust fund for the distribution of the fund;<sup>4</sup> suits by junior lien creditors to have a debtor's assets marshaled to protect their interests;<sup>5</sup> and suits instituted to remove obstructions to legal remedies, as by setting aside fraudulent conveyances or encumbrances.<sup>6</sup> Moreover, the type of proceeding known generally as a creditor's bill may be known by a different name in a particular jurisdiction.<sup>7</sup>

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#### Footnotes

- 1                   Fleming Companies, Inc. v. Rich, 978 F. Supp. 1281 (E.D. Mo. 1997); In re Osgood, 203 B.R. 865 (Bankr. D. Mass. 1997); Cavadi v. DeYeso, 458 Mass. 615, 941 N.E.2d 23 (2011); Doksansky v. Norwest Bank Nebraska, N.A., 260 Neb. 100, 615 N.W.2d 104 (2000); In re Estate of Mason, 109 Ohio St. 3d 532, 2006-Ohio-3256, 849 N.E.2d 998 (2006); Great Lakes Crushing, Ltd. v. DeMarco, 2014-Ohio-4316, 20 N.E.3d 430 (Ohio Ct. App. 11th Dist. Lake County 2014).
- There are two types of creditor's bills: the first is used to reach equitable assets or property of a debtor on which execution at law cannot be levied, and the second is used in aid of an execution at law, as to set aside an encumbrance or a transfer of property made to defraud creditors. [Comcast of IL X v. Multi-Vision Electronics, Inc.](#), 504 F. Supp. 2d 740 (D. Neb. 2007) (applying Nebraska law).
- 2                   As to the remedies of creditors of an insolvent corporation, see Am. Jur. 2d, Corporations[[WestlawNext®\(r\) Search Query](#)].
- 3                   As to interests in decedents' estates, generally, see § 32.
- 4                   Hancock v. Wooten, 107 N.C. 9, 12 S.E. 199 (1890); Great Lakes Crushing, Ltd. v. DeMarco, 2014-Ohio-4316, 20 N.E.3d 430 (Ohio Ct. App. 11th Dist. Lake County 2014).
- 5                   As to marshaling of assets, generally, see Am. Jur. 2d, Marshaling Assets and Inverse Order of Alienation[[WestlawNext®\(r\) Search Query](#)].
- 6                   Cavadi v. DeYeso, 458 Mass. 615, 941 N.E.2d 23 (2011).
- As to fraudulent conveyances, generally, see Am. Jur. 2d, Fraudulent Conveyances and Transfers[[WestlawNext®\(r\) Search Query](#)].
- 7                   Cox v. Nelson, 223 S.W.2d 84 (Tex. Civ. App. Texarkana 1949), writ refused (dissenting opinion).

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## 21 Am. Jur. 2d Creditors' Bills § 2

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

#### I. In General

## § 2. Nature and purpose of bill

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

Under common law, a judgment creditor had no means at law to reach the intangible property of a debtor, and such property had to be reached through actions of equitable origin, such as a creditor's bill.<sup>1</sup> A creditor's bill is a flexible equitable remedy available to a creditor to enforce the execution of a judgment.<sup>2</sup> It is an equitable remedy available to a creditor who seeks to enforce the payment of debts out of assets that cannot be reached by traditional means of execution on a judgment established in a suit at law.<sup>3</sup> A creditor's bill is in the nature of an equitable execution<sup>4</sup> which is granted on the ground that there is no remedy at law,<sup>5</sup> and is a proceeding in rem or quasi in rem rather than in personam.<sup>6</sup> Creditors' bills, even though independent actions in form, are ancillary in effect where brought in aid of another proceeding or in collecting a judgment obtained in another proceeding.<sup>7</sup> The purpose of creditors' bills is in general to bring into exercise the equitable powers of the court to enforce the satisfaction of judgments by means of equitable execution when such cannot be obtained through execution at law,<sup>8</sup> to permit a judgment creditor to discover debtor's assets, and to set aside fraudulent conveyances.<sup>9</sup> It is also used to remove an obstruction from the debtor's property, caused by an encumbrance thereon or its fraudulent transfer, to enable a creditor to obtain a full price for the property at a sale under legal process theretofore issued on such a judgment.<sup>10</sup>

### Observation:

A creditor's bill is ancillary to the original judgment. It is not an action brought upon the judgment as a cause of action, in order to obtain a new judgment, but simply an action ancillary to and for the purpose of obtaining satisfaction of, an existing judgment.

Bringing a creditor's bill action during the life of the judgment neither creates a new lien, nor extends the judgment lien.<sup>11</sup>

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Footnotes

- 1 Itasca Bank and Trust Co. v. Thorleif Larsen and Son, Inc., 352 Ill. App. 3d 262, 287 Ill. Dec. 456, 815 N.E.2d 1259 (2d Dist. 2004); Cavadi v. DeYeso, 458 Mass. 615, 941 N.E.2d 23 (2011).
- 2 Fleming Companies, Inc. v. Rich, 978 F. Supp. 1281 (E.D. Mo. 1997).
- 3 Iantosca v. Benistar Admin. Services, Inc., 843 F. Supp. 2d 148 (D. Mass. 2012); Shockley v. Harry Sander Realty Co., Inc., 771 S.W.2d 922 (Mo. Ct. App. E.D. 1989); Great Lakes Crushing, Ltd. v. DeMarco, 2014-Ohio-4316, 20 N.E.3d 430 (Ohio Ct. App. 11th Dist. Lake County 2014); Olive Branch Holdings, L.L.C. v. Smith Technology Dev., L.L.C., 181 Ohio App. 3d 479, 2009-Ohio-1105, 909 N.E.2d 671 (10th Dist. Franklin County 2009).
- 4 Doksansky v. Norwest Bank Nebraska, N.A., 260 Neb. 100, 615 N.W.2d 104 (2000).
- 5 Cavadi v. DeYeso, 458 Mass. 615, 941 N.E.2d 23 (2011); Graybar Elec. Co. v. Keller Elec. Co., 113 Ohio App. 3d 172, 680 N.E.2d 687 (9th Dist. Summit County 1996).
- 6 North Pacific S. S. Co. v. Guarisco, 293 Or. 341, 647 P.2d 920 (1982).
- 7 Amica Mut. Ins. Co. v. Wartman, 841 N.W.2d 637 (Minn. Ct. App. 2014), review denied, (Mar. 18, 2014); Federal Deposit Ins. Corp. v. Willoughby, 19 Ohio App. 3d 51, 482 N.E.2d 1267 (8th Dist. Cuyahoga County 1984).
- 8 Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999); Cavadi v. DeYeso, 458 Mass. 615, 941 N.E.2d 23 (2011); Doksansky v. Norwest Bank Nebraska, N.A., 260 Neb. 100, 615 N.W.2d 104 (2000).
- 9 Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999); Cavadi v. DeYeso, 458 Mass. 615, 941 N.E.2d 23 (2011).
- 10 Jones v. Green, 68 U.S. 330, 17 L. Ed. 553, 1863 WL 6623 (1863); Fleming Companies, Inc. v. Rich, 978 F. Supp. 1281 (E.D. Mo. 1997) (discussing fraudulent transfers).  
Generally, as to a creditor's bill to set aside a fraudulent conveyance, see Am. Jur. 2d, Fraudulent Conveyances and Transfers[[WestlawNext®\(r\) Search Query](#)].
- 11 Amica Mut. Ins. Co. v. Wartman, 841 N.W.2d 637 (Minn. Ct. App. 2014), review denied, (Mar. 18, 2014).

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## 21 Am. Jur. 2d Creditors' Bills § 3

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

#### I. In General

### § 3. Effect of remedy at law; generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

The general rule that a court of equity accords a remedy only where there is no adequate remedy at law<sup>1</sup> applies to creditors' bills.<sup>2</sup> Relief under creditors' bills will be denied if there is an adequate remedy at law.<sup>3</sup>

A remedy at law allowed by local statutes does not affect the jurisdiction of a federal court to take cognizance of a creditor's bill otherwise within its equity jurisdiction.<sup>4</sup> Nor does the fact that full relief might have been obtained in a state court in an action at law necessarily deprive a federal court of jurisdiction of a creditor's bill if the case shown by the bill is one peculiarly within its equity jurisdiction.<sup>5</sup>

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#### Footnotes

- <sup>1</sup> Am. Jur. 2d, Equity[[WestlawNext®\(r\) Search Query](#)].
- <sup>2</sup> [Graybar Elec. Co. v. Keller Elec. Co.](#), 113 Ohio App. 3d 172, 680 N.E.2d 687 (9th Dist. Summit County 1996).
- <sup>3</sup> [Case v. Beauregard](#), 101 U.S. 688, 25 L. Ed. 1004, 1879 WL 16717 (1879); [Graybar Elec. Co. v. Keller Elec. Co.](#), 113 Ohio App. 3d 172, 680 N.E.2d 687 (9th Dist. Summit County 1996).  
Before a creditor can have the aid of a court of equity to decree the property of a debtor subject to the payment of a debt, the creditor must show that he or she has no adequate remedy at law. [Cepel v. Smallcomb](#), 261 Neb. 934, 628 N.W.2d 654 (2001).
- <sup>4</sup> [U.S. v. Howland](#), 17 U.S. 108, 4 L. Ed. 526, 1819 WL 2190 (1819).
- <sup>5</sup> [Mississippi Mills v. Cohn](#), 150 U.S. 202, 14 S. Ct. 75, 37 L. Ed. 1052 (1893).  
As to the federal rule which permits a creditor to join in one suit an action to establish the debt and to subject to his claim property in the hands of others, see [§ 10](#).

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## 21 Am. Jur. 2d Creditors' Bills II A Refs.

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### Creditors' Bills

John A. Gebauer, J.D.

## II. Pursuit and Exhaustion of Legal Remedies Against Debtor

### A. In General

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### A.L.R. Library

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## 21 Am. Jur. 2d Creditors' Bills § 4

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### Creditors' Bills

John A. Gebauer, J.D.

## II. Pursuit and Exhaustion of Legal Remedies Against Debtor

### A. In General

## § 4. Pursuit and exhaustion of legal remedies against debtor generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### Forms

Am. Jur. Pleading and Practice Forms, Creditors' Bills—Forms Regarding Defenses and Equitable Relief [[WestlawNext®\(r\)](#)  
[Search Query](#)]

In accordance with the principle that equity will not interfere to afford relief by the exercise of its extraordinary powers through a creditor's bill except in the absence of a remedy at law, or where such remedy is inadequate,<sup>1</sup> the established general rule is that a creditor cannot come into equity to obtain satisfaction of his or her claim out of property not reachable by legal process until the creditor has exhausted his or her remedies at law and shown them to be unavailing,<sup>2</sup> and that he or she must allege and prove the fact of such exhaustion as a condition precedent to invoking the aid of equity.<sup>3</sup>

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### Footnotes

- <sup>1</sup> § 3.
- <sup>2</sup> [Taylor v. Bowker](#), 111 U.S. 110, 4 S. Ct. 397, 28 L. Ed. 368 (1884); [Comcast of IL X v. Multi-Vision Electronics, Inc.](#), 504 F. Supp. 2d 740 (D. Neb. 2007); [Doksansky v. Norwest Bank Nebraska, N.A.](#), 260 Neb. 100, 615 N.W.2d 104 (2000).

3 §§ 65, 70.

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## 21 Am. Jur. 2d Creditors' Bills § 5

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### Creditors' Bills

John A. Gebauer, J.D.

## II. Pursuit and Exhaustion of Legal Remedies Against Debtor

### A. In General

## § 5. Against joint debtors

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

Generally, before a creditor may proceed against the property of one joint debtor by a creditor's bill, the creditor must exhaust his or her legal remedies against all the others.<sup>1</sup> A judgment against one of the joint debtors will not constitute a sufficient foundation for the commencement of a creditor's suit to reach the assets of the other debtors.<sup>2</sup>

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### Footnotes

<sup>1</sup> [Brown v. Benson](#), 224 Ill. App. 283, 1922 WL 2393 (1st Dist. 1922).

<sup>2</sup> [Ryckman v. Manerud](#), 68 Or. 350, 136 P. 826 (1913).

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## 21 Am. Jur. 2d Creditors' Bills § 6

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### Creditors' Bills

John A. Gebauer, J.D.

## II. Pursuit and Exhaustion of Legal Remedies Against Debtor

### A. In General

## § 6. Effect of statutory proceedings supplementary to execution

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### Forms

Am. Jur. Pleading and Practice Forms, Creditors' Bills—Forms Regarding Complaints and Petitions [[WestlawNext®\(r\)](#)  
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Proceedings supplementary to execution authorized by statute in many jurisdictions<sup>1</sup> may, in some instances, be regarded as a substitute for the creditor's bill of equity practice.<sup>2</sup> A statutory provision for supplementary proceedings does not per se take away the right of a judgment creditor to maintain a suit in equity to uncover assets fraudulently concealed by the judgment debtor,<sup>3</sup> but where the statute, either expressly or by clear and unmistakable implication, provides that the enactment must be in lieu of the former equitable remedy, the new remedy supersedes the old one.<sup>4</sup>

### Practice Tip:

Where proceedings supplementary to execution do not furnish an adequate remedy, it is generally held that they do not stand in the way of a creditor's suit, and that the latter may still be maintained in a proper case.<sup>5</sup> If equitable interests of a debtor cannot be

reached under supplementary proceedings, there is still need of the equitable relief which a creditor's bill affords, and that remedy exists notwithstanding the existence of the other remedy.<sup>6</sup>

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#### Footnotes

- 1 See, generally, Am. Jur. 2d, Executions and Enforcement of Judgments[[WestlawNext®\(r\) Search Query](#)].
- 2 [Foster v. Evans](#), 384 Mass. 687, 429 N.E.2d 995 (1981); [Wickwire Spencer Steel Co. v. Kemkit Scientific Corporation](#), 292 N.Y. 139, 54 N.E.2d 336, 153 A.L.R. 208 (1944).
- 3 [Fleming Companies, Inc. v. Rich](#), 978 F. Supp. 1281 (E.D. Mo. 1997); [In re Martin](#), 468 B.R. 479 (Bankr. D. Mass. 2012); [In re Osgood](#), 203 B.R. 865 (Bankr. D. Mass. 1997).
- 4 [Knettle v. Knettle](#), 164 Wash. 468, 3 P.2d 133 (1931).
- 5 [Evans v. Paye](#), 32 Cal. App. 4th 265, 37 Cal. Rptr. 2d 915 (3d Dist. 1995); [Equisearch, Inc. v. Lopez](#), 722 P.2d 426 (Colo. App. 1986).
- 6 [Dargan v. Waring](#), 11 Ala. 988, 1847 WL 321 (1847).

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## 21 Am. Jur. 2d Creditors' Bills § 7

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

## II. Pursuit and Exhaustion of Legal Remedies Against Debtor

### A. In General

## § 7. Effect of remedies of attachment or garnishment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

There is authority that the statutory remedies of attachment and garnishment<sup>1</sup> are cumulative only and do not supersede the remedy by way of a creditor's bill,<sup>2</sup> but in other jurisdictions it has been found that such statutory proceedings are exclusive<sup>3</sup> and that only when the remedies of attachment and garnishment do not work to satisfy the judgment is a creditor's bill available.<sup>4</sup>

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### Footnotes

- 1 As to these remedies, generally, see Am. Jur. 2d, Attachment and Garnishment[[WestlawNext®\(r\) Search Query](#)].
- 2 [Powell v. Grewing](#), 562 N.W.2d 761 (Iowa 1997).
- 3 [Hooker v. McLennan](#), 236 Mass. 117, 127 N.E. 626 (1920); [Hoover v. Professional & Executive Mortg. Corp.](#), 21 Ohio App. 3d 223, 486 N.E.2d 1285 (9th Dist. Lorain County 1985) (garnishment).
- 4 [First Nat. Bank in Mitchell v. Daggett](#), 242 Neb. 734, 497 N.W.2d 358 (1993).

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## 21 Am. Jur. 2d Creditors' Bills II B Refs.

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### II. Pursuit and Exhaustion of Legal Remedies Against Debtor

#### B. Recovery of Judgment

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

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A.L.R. Index, Creditors' Bills

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## 21 Am. Jur. 2d Creditors' Bills § 8

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### Creditors' Bills

John A. Gebauer, J.D.

## II. Pursuit and Exhaustion of Legal Remedies Against Debtor


### B. Recovery of Judgment

#### 1. Necessity

## § 8. Rule requiring recovery of judgment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### Forms

Am. Jur. Pleading and Practice Forms, Creditors' Bills—Forms Regarding Defenses and Equitable Relief [[WestlawNext®\(r\) Search Query](#)]

In the absence of modification by statute or by rules of court,<sup>1</sup> and subject to certain exceptions,<sup>2</sup> the general rule is that a creditor must have reduced his or her claim to judgment before the creditor may seek relief by way of a creditor's bill.<sup>3</sup> However, in some jurisdictions, where legal and equitable causes may be joined,<sup>4</sup> the requirement that a creditor must have obtained a judgment at law before a creditor's bill will lie has been characterized as a technical requirement which will not be followed, so that a plaintiff may, in the same action, seek a judgment for the debt and relief by way of a creditor's bill.<sup>5</sup> The principles upon which the rule requiring a judgment rests are that legal questions should be tried by courts of law,<sup>6</sup> and that the debtor has the right to have the issue of indebtedness determined by a jury.<sup>7</sup>

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### Footnotes

1 §§ 9, 10.  
2 §§ 19 to 24.  
3 *Harkin v. Brundage*, 276 U.S. 36, 48 S. Ct. 268, 72 L. Ed. 457 (1928); *Comcast of IL X v. Multi-Vision Electronics, Inc.*, 504 F. Supp. 2d 740 (D. Neb. 2007); *In re Raymond*, 529 B.R. 455 (Bankr. D. Mass. 2015); *Doksansky v. Norwest Bank Nebraska, N.A.*, 260 Neb. 100, 615 N.W.2d 104 (2000); *Great Lakes Crushing, Ltd. v. DeMarco*, 2014-Ohio-4316, 20 N.E.3d 430 (Ohio Ct. App. 11th Dist. Lake County 2014).  
A creditor's bill is an equitable remedy that is based on a judgment at law. *Segal v. Segal*, 86 Conn. App. 617, 863 A.2d 221 (2004).  
As to the necessity for a creditor to obtain a judgment before proceeding by creditor's bill to set aside conveyances alleged to have been made by the debtor in fraud of the creditor's rights, see Am. Jur. 2d, *Fraudulent Conveyances and Transfers*[WestlawNext®(r) Search Query].  
4 Am. Jur. 2d, *Actions*[WestlawNext®(r) Search Query].  
5 *Greenwich Trust Co. v. Tyson*, 129 Conn. 211, 27 A.2d 166 (1942); *C.C. Wyman & Co. v. Farmers' Elevator Co.*, 57 S.D. 377, 232 N.W. 259 (1930).  
6 *Dollman v. Moore*, 70 Miss. 267, 12 So. 23 (1892).  
7 *Ladd v. Judson*, 174 Ill. 344, 51 N.E. 838 (1898); *Roan v. Winn*, 93 Mo. 503, 4 S.W. 736 (1887).

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## 21 Am. Jur. 2d Creditors' Bills § 9

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

## II. Pursuit and Exhaustion of Legal Remedies Against Debtor


### B. Recovery of Judgment

#### 1. Necessity

## § 9. Statutes dispensing with necessity of judgment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

The necessity of a previous judgment as a condition precedent to obtaining equitable relief under a creditor's bill may be dispensed with by statute.<sup>1</sup> A statute authorizing bills by creditors to reach and apply to the payment of a debt any property right, title, or interest, legal or equitable, of a debtor, which cannot be attached or taken at execution in a suit at law against such debtor, has been construed to authorize the creditor to proceed without first obtaining judgment.<sup>2</sup> Such statutes, being remedial, are given a liberal construction to effect the object designed.<sup>3</sup>

Another form of statute permits a creditor's suit to be commenced in equity before a judgment at law is rendered, so long as an action at law has been filed,<sup>4</sup> but no final decree can be entered upon the creditor's bill until the claim has been reduced to judgment.<sup>5</sup> Under such a statute, a creditor's suit is ordinarily permitted only where a claim for indebtedness is involved in the action at law, and the mere institution of an action at law for damages, not involving a claim for a debt, does not authorize the filing of a creditor's suit.<sup>6</sup>

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### Footnotes

- 1 [Emarine v. Haley](#), 892 P.2d 343 (Colo. App. 1994).
- 2 [Foster v. Evans](#), 384 Mass. 687, 429 N.E.2d 995 (1981).
- 3 [Miller v. Maryland Casualty Co.](#), 207 Ark. 312, 180 S.W.2d 581 (1944).
- 4 [Wendell v. Wilshire Corp.](#), 544 So. 2d 320 (Fla. 4th DCA 1989).
- 5 [Wendell v. Wilshire Corp.](#), 544 So. 2d 320 (Fla. 4th DCA 1989).

6 [Wendell v. Wilshire Corp., 544 So. 2d 320 \(Fla. 4th DCA 1989\).](#)

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## 21 Am. Jur. 2d Creditors' Bills § 10

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

## II. Pursuit and Exhaustion of Legal Remedies Against Debtor


### B. Recovery of Judgment

#### 1. Necessity

## § 10. Under Federal Rules of Civil Procedure

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

Under the Federal Rules of Civil Procedure,<sup>1</sup> two claims may be joined in a single action, although prior to adoption of the Rules one was cognizable only after the other had been prosecuted to a conclusion.<sup>2</sup> Therefore, a creditor may, without first obtaining judgment on the debt and without execution being returned nulla bona, pursue in one suit both the creditor's demand for establishment of the debt and his or her demand to subject to his or her claim property in the hands of others.<sup>3</sup>

Under the Federal Rules of Civil Procedure,<sup>4</sup> remedies available under the law of the state for the purpose of securing satisfaction of a judgment ultimately to be entered are also available in an action in federal court, and another Rule<sup>5</sup> provides that proceedings in aid of execution must be in accordance with the practice and procedure of the state in which the district court is held. Where under state statutory provisions a creditor's bill may be filed before the common law judgment is obtained,<sup>6</sup> a creditor's bill may be filed ancillary to a complaint for patent infringement and damages in a federal district court in that state.<sup>7</sup>

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### Footnotes

- <sup>1</sup> Fed. R. Civ. P. 18(b).
- <sup>2</sup> Am. Jur. 2d, Actions[WestlawNext®(r) Search Query].
- <sup>3</sup> *Huntress v. Huntress' Estate*, 235 F.2d 205, 61 A.L.R.2d 682 (7th Cir. 1956).
- <sup>4</sup> Fed. R. Civ. P. 64.
- <sup>5</sup> Fed. R. Civ. P. 69.

6 § 9.  
7 Livesay Industries, Inc. v. Livesay Window Co., 305 F.2d 934 (5th Cir. 1962).

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## 21 Am. Jur. 2d Creditors' Bills § 11

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

## II. Pursuit and Exhaustion of Legal Remedies Against Debtor

### B. Recovery of Judgment

#### 2. Sufficiency, Nature, and Effect of Judgment

### § 11. Sufficiency, nature, and effect of judgment generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor  11

To comply with the rule that a judgment at law is a condition precedent to relief by a creditor's bill,<sup>1</sup> the judgment must be a valid and subsisting one; neither a void judgment<sup>2</sup> nor a judgment that has been discharged or satisfied<sup>3</sup> will suffice.<sup>4</sup> However, mere irregularity in the judgment relied upon in support of a creditor's bill cannot operate as a defense; in other words, the rule which forbids a collateral attack on the grounds of error or irregularity in the obtaining of a judgment<sup>5</sup> applies to prevent the defendant in a creditor's bill from asserting irregularity in respect of the judgment relied upon by the plaintiff.<sup>6</sup> However, the judgment forming the basis of the creditor's suit must be one that is enforceable under recognized principles of equity, and the plaintiff must come into court with clean hands and a pure conscience, and if the court discovers that his or her rights are tainted with fraud, it will of its own motion institute an investigation.<sup>7</sup>

A default judgment is a sufficient judgment to support relief by way of a creditor's bill.<sup>8</sup> However, the judgment required is one against the original debtor, not against a party in possession of the judgment debtor's assets.<sup>9</sup>

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#### Footnotes

- <sup>1</sup> § 8.
- <sup>2</sup> [Chaney v. Kibler](#), 171 Va. 194, 198 S.E. 877 (1938).
- <sup>3</sup> [Bain v. Atkins](#), 181 Mass. 240, 63 N.E. 414 (1902).  
As to dormant judgments, see § 12.

- 4 As to the effect of a judgment at law in establishing the indebtedness of a defendant to a plaintiff in a creditor's suit, see § 72.
- As to the sufficiency, for the purpose of supporting a creditor's bill, of a judgment rendered by the court of another jurisdiction, see §§ 13 to 15.
- 5 Am. Jur. 2d, Judgments[WestlawNext®(r) Search Query].
- 6 Federal Deposit Ins. Corp. v. Willoughby, 19 Ohio App. 3d 51, 482 N.E.2d 1267 (8th Dist. Cuyahoga County 1984).
- 7 Woodcock v. Petrol Corp., 48 Cal. App. 2d 652, 120 P.2d 889 (2d Dist. 1941).
- 8 Mills v. Lawhon, 448 So. 2d 1162 (Fla. 1st DCA 1984); Federal Deposit Ins. Corp. v. Willoughby, 19 Ohio App. 3d 51, 482 N.E.2d 1267 (8th Dist. Cuyahoga County 1984).
- 9 Shockley v. Harry Sander Realty Co., Inc., 771 S.W.2d 922 (Mo. Ct. App. E.D. 1989).

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## 21 Am. Jur. 2d Creditors' Bills § 12

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

## II. Pursuit and Exhaustion of Legal Remedies Against Debtor


### B. Recovery of Judgment

#### 2. Sufficiency, Nature, and Effect of Judgment

## § 12. Dormant judgments

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

A dormant judgment<sup>1</sup> will not, as a rule, support a creditor's bill.<sup>2</sup> There is some authority, however, that this rule is not applicable in respect of creditors' bills to reach property which is not subject to be taken on legal process.<sup>3</sup> In addition, the fact that a judgment has become dormant for failure to issue execution thereon after the filing of a creditor's bill to enforce the judgment will not affect the right to maintain the bill.<sup>4</sup>

Some jurisdictions hold that since the creditor's action is in the nature of an equitable execution, it tolls the statute of dormancy as far as the particular property sought to be reached is concerned, and hence the issuance of a general execution upon the judgment during the pendency of the action is not necessary to keep the judgment alive so far as the specific property equitably levied upon by the suit is concerned.<sup>5</sup> On the other hand, the view has been taken that, as a necessary, absolute condition precedent, there must be an actual subsisting judgment to support a creditor's bill at the time of rendering the decree therein; according to this view, the proceeding being wholly ancillary to the judgment and in aid of the execution issued thereon, if, pending the action, the plaintiff's judgment becomes dormant by lapse of time, the action must fail.<sup>6</sup>

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### Footnotes

- 1 As to dormant judgments, generally, see Am. Jur. 2d, Judgments[[WestlawNext®\(r\) Search Query](#)].
- 2 *Hardee v. Lynch*, 212 S.C. 6, 46 S.E.2d 179 (1948).
- 3 *Brown v. Long*, 36 N.C. 190, 1 Ired. Eq. 190, 1840 WL 818 (1840).
- 4 *City of Cincinnati v. Hafer*, 49 Ohio St. 60, 30 N.E. 197 (1892).

5 [Flint v. Chaloupka, 72 Neb. 34, 99 N.W. 825 \(1904\).](#)

6 [Miller v. Melone, 1901 OK 55, 11 Okla. 241, 67 P. 479 \(1901\).](#)

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## 21 Am. Jur. 2d Creditors' Bills § 13

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

## II. Pursuit and Exhaustion of Legal Remedies Against Debtor


### B. Recovery of Judgment

## 3. Judgments of Courts of Other Jurisdictions

# § 13. Judgments of courts of other jurisdictions generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

The general rule is that a creditor's bill cannot be predicated on the judgment of a sister state;<sup>1</sup> in other words, a creditor's bill cannot be maintained without first reducing the foreign judgment to a local judgment by suing on the foreign judgment in the state in which the creditor's bill is sought.<sup>2</sup> In the absence of a statute to the contrary, the creditor is required to set forth in his or her bill a judgment in the jurisdiction where the suit in equity is brought or to show that it is impossible to obtain such a judgment in any court within such jurisdiction.<sup>3</sup>

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### Footnotes

- 1 [Miller v. Security-Peoples Trust Co.](#), 142 Fla. 434, 195 So. 191, 129 A.L.R. 500 (1940).
- 2 [Miller v. Security-Peoples Trust Co.](#), 142 Fla. 434, 195 So. 191, 129 A.L.R. 500 (1940); [North Pacific S. Co. v. Guarisco](#), 293 Or. 341, 647 P.2d 920 (1982).  
As to the recognition and enforcement of foreign judgments, generally, see Am. Jur. 2d, Executions and Enforcement of Judgments[[WestlawNext®\(r\) Search Query](#)].
- 3 [§ 65](#).

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## 21 Am. Jur. 2d Creditors' Bills § 14

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### Creditors' Bills

John A. Gebauer, J.D.

## II. Pursuit and Exhaustion of Legal Remedies Against Debtor

### B. Recovery of Judgment

## 3. Judgments of Courts of Other Jurisdictions

# § 14. Judgment of federal court as basis of creditor's bill in state court

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

As a general rule, a creditor's bill filed in a state court may be based on a judgment of a federal court sitting in the same state, since the courts of the United States within a particular state are not, in that state, regarded as foreign courts, and their judgments are treated as domestic judgments.<sup>1</sup> There is, however, some contrary authority holding that a creditor cannot maintain a suit based on a judgment of a federal court without first obtaining a judgment thereon in the state court.<sup>2</sup>

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### Footnotes

- 1 [Chicago & A. Bridge Co. v. Fowler](#), 55 Kan. 17, 39 P. 727 (1895); [First Nat. Bank v. Sloman](#), 42 Neb. 350, 60 N.W. 589 (1894).
- 2 [Winslow v. Leland](#), 128 Ill. 304, 21 N.E. 588 (1889).

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## 21 Am. Jur. 2d Creditors' Bills § 15

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

## II. Pursuit and Exhaustion of Legal Remedies Against Debtor


### B. Recovery of Judgment

#### 3. Judgments of Courts of Other Jurisdictions

## § 15. Judgment of another federal court or state court as basis of creditor's bill in federal court

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

Although, under modern federal procedure, a creditor may join in one action his or her demand for a judgment at law and for equitable relief,<sup>1</sup> the question may still arise whether a creditor's bill in a federal court may be based on a judgment recovered in a state court or in a federal court in another district, and it has generally been held that such a bill may be based on a judgment of a state court of the district over which the federal court's jurisdiction extends.<sup>2</sup> Jurisdiction in such case is not necessarily affected by the fact that a remedy at law is provided for by local laws.<sup>3</sup> However, in litigations between private parties, a bill cannot be maintained in a federal court upon a judgment recovered in a state other than that in which suit is brought.<sup>4</sup>

On the question of whether a creditor's bill in a federal court may be based on a judgment in another federal court, it has been found that such a bill cannot be based on a judgment rendered and execution issued in a federal district located in another state.<sup>5</sup> However, it has been stated that a federal district court may properly assume jurisdiction to obtain satisfaction of a judgment rendered in favor of the United States in a federal district located in another state if execution has been issued and returned unsatisfied.<sup>6</sup> This is due to the peculiar effect given a judgment in favor of the United States and an execution thereon.<sup>7</sup>

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### Footnotes

- <sup>1</sup> § 10.
- <sup>2</sup> *National Tube Works Co. v. Ballou*, 146 U.S. 517, 13 S. Ct. 165, 36 L. Ed. 1070 (1892); *Feidler v. Bartleson*, 161 F. 30 (C.C.A. 9th Cir. 1908).
- <sup>3</sup> § 3.

- 4                    [National Tube Works Co. v. Ballou](#), 146 U.S. 517, 13 S. Ct. 165, 36 L. Ed. 1070 (1892).
- 5                    [Pierce v. U.S.](#), 255 U.S. 398, 41 S. Ct. 365, 65 L. Ed. 697 (1921) (recognizing, but not applying, the rule  
in the particular case).
- 6                    [Pierce v. U.S.](#), 255 U.S. 398, 41 S. Ct. 365, 65 L. Ed. 697 (1921).
- 7                    [28 U.S.C.A. § 2413](#), providing that a writ of execution on a judgment obtained for the use of the United  
States in any federal court may be executed in any other state, in any territory, or in the District of Columbia.

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## 21 Am. Jur. 2d Creditors' Bills II C Refs.

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### Creditors' Bills

John A. Gebauer, J.D.


#### II. Pursuit and Exhaustion of Legal Remedies Against Debtor

##### C. Execution and Return Unsatisfied

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### A.L.R. Library

A.L.R. Index, Creditors' Bills

West's A.L.R. Digest, Debtor and Creditor 11

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## 21 Am. Jur. 2d Creditors' Bills § 16

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### Creditors' Bills

John A. Gebauer, J.D.

### II. Pursuit and Exhaustion of Legal Remedies Against Debtor

#### C. Execution and Return Unsatisfied

## § 16. Necessity

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### Forms

Am. Jur. Pleading and Practice Forms, Creditors' Bills—Forms Regarding Defenses and Equitable Relief [[WestlawNext®\(r\)](#)  
[Search Query](#)]

In view of the general rule that a creditor cannot come into equity to obtain satisfaction of his or her claim out of property not reachable by legal process until the creditor has exhausted his or her remedies at law and shown them to be unavailing,<sup>1</sup> a creditor who seeks equitable relief to accomplish that purpose must, in order to comply with that rule, not only obtain a judgment as a condition of the right to such relief,<sup>2</sup> but also must be able to show that an execution has been issued in the form and manner required by law and has been returned unsatisfied in whole or in part.<sup>3</sup> The bill itself must contain allegations to this effect, or show a legal and sufficient excuse for not doing so.<sup>4</sup> However, a state rule that a judgment must be obtained and an execution returned unsatisfied before a creditor's bill may be maintained is not a substantive rule of property.<sup>5</sup> Therefore, since under the Federal Rules of Civil Procedure it is not necessary for one seeking equitable relief to hold a judgment on which execution has issued and been returned unsatisfied,<sup>6</sup> a creditor has a right to pursue both his or her demand for the establishment of the debt due the creditor and his or her suit in the nature of a creditor's bill in one action in a federal court sitting in a state requiring a return nulla bona.<sup>7</sup>



Footnotes

- 1 § 4.
- 2 § 8.
- 3 [Harkin v. Brundage](#), 276 U.S. 36, 48 S. Ct. 268, 72 L. Ed. 457 (1928); [Graybar Elec. Co. v. Keller Elec. Co.](#), 113 Ohio App. 3d 172, 680 N.E.2d 687 (9th Dist. Summit County 1996).  
As to exceptions to the rule requiring the issue of execution and its return unsatisfied, see §§ [19](#) to [24](#).  
As to whether it is necessary to have execution issued during the pendency of a suit to keep the judgment alive, see § [12](#).
- 4 §§ [65](#), [70](#).
- 5 [Huntress v. Huntress' Estate](#), 235 F.2d 205, 61 A.L.R.2d 682 (7th Cir. 1956).
- 6 § 10.
- 7 [Huntress v. Huntress' Estate](#), 235 F.2d 205, 61 A.L.R.2d 682 (7th Cir. 1956).

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## 21 Am. Jur. 2d Creditors' Bills § 17

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

## II. Pursuit and Exhaustion of Legal Remedies Against Debtor

### C. Execution and Return Unsatisfied

## § 17. Sufficiency of return

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### Forms

Am. Jur. Pleading and Practice Forms, Creditors' Bills—Forms Regarding Defenses and Equitable Relief [[WestlawNext®\(r\)](#)  
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The return of an execution unsatisfied, in whole or in part, which is generally necessary before the judgment creditor may maintain a creditor's bill,<sup>1</sup> must be legal in substance, form, and manner.<sup>2</sup> The return should show that the debtor has no property subject to levy or that the execution is partially unsatisfied due to an insufficiency of property subject to levy,<sup>3</sup> and should be made by the officer to whom the execution was directed.<sup>4</sup>

The law requiring the issuance and return of an execution contemplates more than formal acts; a good-faith effort must be made to find property upon which a levy can be made, and a collusive return of an execution is fatal to relief in equity by a creditor's bill.<sup>5</sup>

When one execution has been issued and returned unsatisfied, it is not necessary to issue another.<sup>6</sup> However, it may be necessary for a judgment creditor to have alias executions issued in order that it may properly be said that the creditor has exhausted his or her legal remedy by pursuing the debtor in every county where it may reasonably be presumed that he or she has property, or in the case of several judgment debtors, where it is likely that any of them may have property.<sup>7</sup>

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Footnotes

- 1                   § 16.
- 2                   As to the legal principles governing the return of executions, generally, see Am. Jur. 2d, Executions and  
Enforcement of Judgments[[WestlawNext®\(r\) Search Query](#)].
- 3                   Baxter v. Pritchard, 113 Iowa 422, 85 N.W. 633 (1901).
- 4                   Johnson v. Elkins, 90 Ky. 163, 11 Ky. L. Rptr. 967, 13 S.W. 448 (1890).
- 5                   Stirlen v. Jewett, 165 Ill. 410, 46 N.E. 259 (1897).
- 6                   Strange v. Longley, 3 Barb. Ch. 650, 5 N.Y. Ch. Ann. 1044, 1847 WL 4197 (N.Y. Ch. 1847).
- 7                   Durand v. Gray, 129 Ill. 9, 21 N.E. 610 (1889).

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## 21 Am. Jur. 2d Creditors' Bills § 18

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### Creditors' Bills

John A. Gebauer, J.D.


### II. Pursuit and Exhaustion of Legal Remedies Against Debtor

#### C. Execution and Return Unsatisfied

## § 18. Conclusiveness and effect of execution and return

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### Forms

Am. Jur. Pleading and Practice Forms, Creditors' Bills—Forms Regarding Defenses and Equitable Relief [[WestlawNext®\(r\)](#)  
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With regard to the conclusiveness of the return nulla bona as proof of the exhaustion of the remedy at law, the general rule is that when the execution, properly issued, has been returned unsatisfied, this is sufficient, and the way is open to the creditor's equitable action.<sup>1</sup> The return establishes, prima facie at least, that the creditor has exhausted his or her legal remedies, and the burden is on the defendant to overcome the presumption by other evidence.<sup>2</sup> Indeed, there is authority for the view that an execution and its return unsatisfied are the highest evidence of the fact that the remedy afforded at law for the collection of the judgment has been pursued unavailingly, and that the court will look no further in determining the existence of that fact.<sup>3</sup>

There is, however, some authority to the effect that it is not sufficient to show that an execution was issued and returned nulla bona, and that the averment of such a return is not the same as an allegation that the debtor has no property subject to execution.<sup>4</sup> In addition, according to some authorities, the rule that a return which is regular on its face is conclusive in a creditor's suit does not preclude the defendant from showing in such suit that the return does not represent the truth, but was made by the sheriff acting in collusion with, and at the direction of, the judgment creditor or the latter's attorney.<sup>5</sup>

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Footnotes

- 1 [Miller v. Sherry](#), 69 U.S. 237, 17 L. Ed. 827, 1864 WL 6603 (1864); [Berger v. Loomis](#), 169 Or. 575, 131 P.2d 211, 144 A.L.R. 636 (1942).
- 2 [Brunvold v. Victor Johnson & Co.](#), 59 Cal. App. 2d 75, 138 P.2d 32 (1st Dist. 1943) (return is ordinarily conclusive).
- 3 [Jones v. Green](#), 68 U.S. 330, 17 L. Ed. 553, 1863 WL 6623 (1863).
- 4 [Mackey v. Wallace](#), 26 Tex. 526, 1863 WL 2736 (1863).
- 5 [Stirlen v. Jewett](#), 165 Ill. 410, 46 N.E. 259 (1897).

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## 21 Am. Jur. 2d Creditors' Bills II D Refs.

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### II. Pursuit and Exhaustion of Legal Remedies Against Debtor

### D. Exceptions to Rule Requiring Exhaustion of Legal Remedies

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

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A.L.R. Index, Creditors' Bills

West's A.L.R. Digest, Debtor and Creditor 11

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## 21 Am. Jur. 2d Creditors' Bills § 19

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### Creditors' Bills

John A. Gebauer, J.D.


#### II. Pursuit and Exhaustion of Legal Remedies Against Debtor

##### D. Exceptions to Rule Requiring Exhaustion of Legal Remedies

### § 19. Exceptions to rule requiring exhaustion of legal remedies; impossibility or impracticability

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

The general rule that equity will not enforce a demand by creditor's bill until a judgment has been obtained and an execution issued thereunder and returned unsatisfied, or at least partially unsatisfied,<sup>1</sup> is not applied without exception; its application is limited by the reasons which support it.<sup>2</sup> If the amount of the indebtedness is admitted, the rule requiring that the claim be reduced to judgment is not applied,<sup>3</sup> especially where it is apparent that a judgment and execution against the debtor would be futile.<sup>4</sup>

The impossibility, impracticability, or futility of exhausting the remedy at law has been held to be a sufficient excuse for not doing so.<sup>5</sup> If the debtor is not subject to being served by the ordinary process of law, the rule requiring that the claim be reduced to judgment is not strictly applied.<sup>6</sup>

When a statute in positive terms directs the return of an execution nulla bona, it has been stated that that condition cannot be dispensed with.<sup>7</sup> Even in this situation, however, there is some authority to the effect that the impracticability or impossibility of compliance with the terms of the statute excuses noncompliance.<sup>8</sup>

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#### Footnotes

<sup>1</sup> §§ 8, 16.

<sup>2</sup> [Miller v. Maryland Casualty Co.](#), 207 Ark. 312, 180 S.W.2d 581 (1944).

A reach and apply statute is subject to equitable limitations. *Tilcon Capaldi, Inc. v. Feldman*, 249 F.3d 54 (1st Cir. 2001) (applying Massachusetts law).

*Jones v. Davis*, 306 S.W.2d 479 (Mo. 1957).

*U.S. v. Russell*, 241 F.2d 879 (1st Cir. 1957); *In re Wojtkun*, 534 B.R. 435 (Bankr. D. Mass. 2015) (no judgment required where a judgment and execution would be of no practical utility).

*Case v. Beauregard*, 101 U.S. 688, 25 L. Ed. 1004, 1879 WL 16717 (1879); *U.S. v. Russell*, 241 F.2d 879 (1st Cir. 1957).

*Johnson v. Fotie*, 308 S.W.2d 662 (Mo. 1958).

As to nonresidence or absence of debtor, see §§ 20, 21.

*Mixon v. Dunklin*, 48 Ala. 455, 1872 WL 944 (1872).

*Skilton v. Codington*, 185 N.Y. 80, 77 N.E. 790 (1906).

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## 21 Am. Jur. 2d Creditors' Bills § 20

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.


### II. Pursuit and Exhaustion of Legal Remedies Against Debtor

#### D. Exceptions to Rule Requiring Exhaustion of Legal Remedies

## § 20. Nonresidence or absence of debtor

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

Although there is some authority to the contrary,<sup>1</sup> most of the courts support the general rule that nonresidence or absence of a debtor, as where he is a fugitive from justice, obviates the necessity of a prior judgment at law, at least where such nonresidence or absence renders it impossible or impractical to obtain such a judgment and there is no adequate remedy by which the debtor's property can be reached.<sup>2</sup> The theory underlying this general rule is that a prior judgment is required in any case merely because it is the best evidence that the creditor has exhausted his or her remedies at law, and that where the nonresidence or absence of the debtor has rendered it impossible to obtain this evidence, equity may act upon other evidence which it finds is sufficient to show that the creditor has no adequate remedy at law.<sup>3</sup> Equity does not permit a nonresident debtor to escape payment of the just claim of a resident creditor because the debtor's absence from the jurisdiction prevents the creditor from obtaining a personal judgment against him or her, and there is no other adequate remedy at law to reach the debtor's property.<sup>4</sup> In addition, the rule which excuses the failure to obtain a prior judgment also dispenses with the necessity of the issuance and return of an execution.<sup>5</sup>

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### Footnotes

- <sup>1</sup> [Smith v. Moore](#), 35 Ala. 76, 1859 WL 667 (1859); [Ladd v. Judson](#), 174 Ill. 344, 51 N.E. 838 (1898).
- <sup>2</sup> [Miller v. Maryland Casualty Co.](#), 207 Ark. 312, 180 S.W.2d 581 (1944); [First State Bank of Clermont v. Fitch](#), 105 Fla. 435, 141 So. 299 (1932); [Publicity Bldg. Realty Corp. v. Thomann](#), 353 Mo. 493, 183 S.W.2d 69 (1944).
- <sup>3</sup> [Williams v. Adler-Goldman Commission Co.](#), 227 F. 374 (C.C.A. 8th Cir. 1915); [Miller v. Maryland Casualty Co.](#), 207 Ark. 312, 180 S.W.2d 581 (1944).
- <sup>4</sup> [Miller v. Maryland Casualty Co.](#), 207 Ark. 312, 180 S.W.2d 581 (1944).

5 [Shuck v. Quackenbush, 75 Colo. 592, 227 P. 1041, 38 A.L.R. 259 \(1924\).](#)

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## 21 Am. Jur. 2d Creditors' Bills § 21

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.


#### II. Pursuit and Exhaustion of Legal Remedies Against Debtor

##### D. Exceptions to Rule Requiring Exhaustion of Legal Remedies

### § 21. Nonresidence or absence of debtor—Effect of availability of other remedy

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

The general rule that the absence or nonresidence of a debtor creates an exception to the requirement of a prior judgment in maintaining a creditor's bill is predicated partially on the absence of an adequate remedy at law by which the debtor's property can be reached.<sup>1</sup> Ordinarily, therefore, relief will be denied if there exists a possible remedy at law, despite the debtor's nonresidence or absence.<sup>2</sup> In a number of cases, where the debtor was a nonresident, a creditor's bill could not be maintained where relief by attachment<sup>3</sup> or garnishment<sup>4</sup> was available to the creditor. However, the suing out of a writ of attachment has been excused where it would have been impossible to execute it as required by statute.<sup>5</sup> Furthermore, some authorities treat the nonresidence or absence of the debtor as in itself sufficient to relieve the creditor of the necessity of procuring a judgment at law before seeking the assistance of equity, without regard to whether the creditor might have some remedy at law in spite of such absence or nonresidence.<sup>6</sup>

The possibility of obtaining relief by judgment at law in another state has been asserted as a reason for the refusal of courts of equity to take primary jurisdiction in creditors' bills involving nonresident debtors.<sup>7</sup> Conversely, the fact that the creditor pursued his or her legal remedy as far as possible in another jurisdiction has been referred to in cases in which a local judgment at law was not required.<sup>8</sup>

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#### Footnotes

- <sup>1</sup> [§ 20](#).  
As to the effect of a remedy of law, generally, see [§ 3](#).

- 2                    Roberts v. Buckingham, 172 Cal. 458, 156 P. 1018 (1916); First Nat. Bank v. Randall, 20 R.I. 319, 38 A.  
1055 (1897).
- 3                    James v. Schafer, 70 Cal. App. 372, 233 P. 70 (3d Dist. 1924); Knox v. Farguson, 97 Kan. 487, 155 P. 929  
(1916).
- 4                    Hamburger Apparel Co. v. Werner, 17 Wash. 2d 310, 135 P.2d 311 (1943).
- 5                    Shuck v. Quackenbush, 75 Colo. 592, 227 P. 1041, 38 A.L.R. 259 (1924).
- 6                    Quarl v. Abbott, 102 Ind. 233, 1 N.E. 476 (1885); First Nat. Bank v. Eichmeier, 153 Iowa 154, 133 N.W.  
454 (1911).
- 7                    Brumbaugh v. Jones, 70 Neb. 786, 98 N.W. 54 (1904).
- 8                    Bank of Commerce & Trusts of Richmond, Va. v. McArthur, 256 F. 84 (C.C.A. 5th Cir. 1919); Fidelity  
Savings & Loan Ass'n v. Reese, 41 S.D. 546, 171 N.W. 812 (1919).

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## 21 Am. Jur. 2d Creditors' Bills § 22

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

#### II. Pursuit and Exhaustion of Legal Remedies Against Debtor

##### D. Exceptions to Rule Requiring Exhaustion of Legal Remedies

## § 22. Insolvency of debtor

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

The courts are not in agreement as to whether a creditor must reduce his or her claim to judgment, in order to maintain a creditor's bill, when the debtor is clearly insolvent.<sup>1</sup> One line of authority takes the view that the recovery of judgment against an insolvent debtor is required and that it cannot be considered useless, since it establishes the creditor's claim.<sup>2</sup> On the other hand, it has been said that a creditor should not be required to procure a judgment upon which execution must prove fruitless, that it may be otherwise satisfactorily proved to the court that the debtor has not sufficient property on which levy can be made by legal process, and that the creditor should not be prejudiced in the enforcement of his rights by useless delay.<sup>3</sup>

Considering the issue whether insolvency of the debtor excuses the failure to issue an execution, in some cases the insolvency of a judgment debtor renders the issuance of execution and a return thereof unnecessary as a condition precedent to the filing of a creditor's bill,<sup>4</sup> since insolvency, which is the material matter to be proved, may be shown by competent evidence other than that afforded by an execution issued and returned unsatisfied, and to hold otherwise would be to require compliance with a meaningless formality.<sup>5</sup> On the other hand, there is authority that the courts should refuse to relax to such an extent the rule requiring an exhaustion of legal remedies, that the best evidence of the judgment debtor's insolvency is that afforded by the issuance and return of an execution unsatisfied, and that where such evidence is available none of a secondary nature will be considered.<sup>6</sup>

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### Footnotes

<sup>1</sup> As to what constitutes insolvency, generally, see Am. Jur. 2d, Insolvency[[WestlawNext®\(r\) Search Query](#)].

- 2 Ivey v. Housing Foundation of America, 73 F. Supp. 201 (M.D. Pa. 1947); Buckley v. Maupin, 344 Mo.  
193, 125 S.W.2d 820 (1939).
- 3 Kempton v. Morris L. Hallowell & Co., 24 Ga. 52, 1858 WL 2154 (1858); Security Sav. & Trust Co. v.  
Portland Flour Mills Co., 124 Or. 276, 261 P. 432 (1927).
- 4 Case v. Beauregard, 101 U.S. 688, 25 L. Ed. 1004, 1879 WL 16717 (1879); O'Brien v. Stambach, 101 Iowa  
40, 69 N.W. 1133 (1897).
- 5 Case v. Beauregard, 101 U.S. 688, 25 L. Ed. 1004, 1879 WL 16717 (1879).
- 6 Buckley v. Maupin, 344 Mo. 193, 125 S.W.2d 820 (1939).

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## 21 Am. Jur. 2d Creditors' Bills § 23

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

#### II. Pursuit and Exhaustion of Legal Remedies Against Debtor

##### D. Exceptions to Rule Requiring Exhaustion of Legal Remedies

## § 23. Death of debtor

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

An exception to the general rules in relation to conditions precedent to equitable relief on behalf of creditors is sometimes made when the legal remedies are obstructed by the death of the debtor and the laws relating to the administration of decedents' estates.<sup>1</sup>

Allowance, by a probate court, of a claim against a decedent's estate is the equivalent of a judgment for the purpose of maintaining a creditor's bill.<sup>2</sup> According to the Restatement, the creditors of a deceased beneficiary of a trust can reach his or her interest to the extent to which they could reach a corresponding legal interest, except insofar as a corresponding legal interest is exempt from creditors' claims.<sup>3</sup>

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#### Footnotes

- <sup>1</sup> Winslow v. Leland, 128 Ill. 304, 21 N.E. 588 (1889); Dollman v. Moore, 70 Miss. 267, 12 So. 23 (1892).
- <sup>2</sup> White v. Russell, 79 Ill. 155, 1875 WL 8588 (1875); Buckley v. Maupin, 344 Mo. 193, 125 S.W.2d 820 (1939).
- <sup>3</sup> Restatement Third, Trusts § 56.

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## 21 Am. Jur. 2d Creditors' Bills § 24

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### II. Pursuit and Exhaustion of Legal Remedies Against Debtor

### D. Exceptions to Rule Requiring Exhaustion of Legal Remedies

## § 24. Where legal remedies exhausted as to one of several claims

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

There is some authority for the proposition that if one claim has been reduced to judgment and the remedy at law exhausted, not even a judgment is required as a condition precedent to relief on another claim of either the same or a different creditor.<sup>1</sup> On the other hand, the necessity for reducing a purely legal claim to judgment and issuing execution thereon is not excused by combining with it a claim as to which the legal remedy has been exhausted.<sup>2</sup>

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### Footnotes

<sup>1</sup> [Carp v. Chipley, 73 Mo. App. 22, 1898 WL 1896 \(1898\); State v. Foot, 27 S.C. 340, 3 S.E. 546 \(1887\).](#)

<sup>2</sup> [Russell v. Chicago Trust & Savings Bank, 139 Ill. 538, 29 N.E. 37 \(1891\).](#)

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## 21 Am. Jur. 2d Creditors' Bills III A Refs.

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill

#### A. In General

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### A.L.R. Library

A.L.R. Index, Creditors' Bills

West's A.L.R. Digest, Debtor and Creditor 11

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## 21 Am. Jur. 2d Creditors' Bills § 25

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### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill

#### A. In General

## § 25. Property subject to bill generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

As a general rule, it is within the jurisdiction of a court of equity to assist a judgment creditor seeking its aid by a creditor's bill, to reach and apply to the payment of his or her debts any property of the debtor which by reason of its nature only, and not by reason of any positive rule exempting it from liability for debt, cannot be taken on execution at law.<sup>1</sup> Property which is subject to be taken under attachment or execution at law generally is not subject to a creditor's bill in equity,<sup>2</sup> the reason being that the legal remedy is adequate.<sup>3</sup> Stated differently, a creditor's bill against a judgment debtor can reach only intangible property, inasmuch as tangible property could be seized pursuant to a writ of execution.<sup>4</sup> Rents of lands and leaseholds cannot ordinarily be reached if they are subject to execution.<sup>5</sup> However, where the property sought to be subjected to a creditor's bill consists in part of property leviable at law, such as real estate, and in part of property not leviable, such as the debtor's interest in a business, the entire property is subject to a creditor's bill.<sup>6</sup>

Personal property as well as real property is subject to a creditor's bill,<sup>7</sup> so long as it is not exempt.<sup>8</sup> The inherent powers of a court of equity extend to the seizure and sale of intangible property as well.<sup>9</sup> However, the good will of a business is not an asset which may be reached by a creditor's bill.<sup>10</sup>

### Practice Tip:

Statutes may designate property that can be reached on a creditor's bill, as, for example, any property, right, title, or interest, legal or equitable, which cannot be reached to be attached or taken on execution in an action at law.<sup>11</sup>

The rights of a creditor to the property of his or her debtor are derivative and therefore are limited to the rights of the debtor.<sup>12</sup>

**Practice Tip:**

After-acquired property of the defendant in a creditor's bill can be reached only by filing a supplemental bill or complaint.<sup>13</sup>

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Footnotes

- 1 [Ager v. Murray](#), 105 U.S. 126, 26 L. Ed. 942, 1881 WL 19730 (1881); [Berger v. Dixon & Snow, P.C.](#), 868 P.2d 1149 (Colo. App. 1993).  
If a third person is indebted to the judgment debtor or possesses property in which the judgment debtor has an interest, the judgment creditor may bring an action against the third person to have the interest or debt applied to the satisfaction of the money judgment. [Ilshin Inv. Co., Ltd. v. Buena Vista Home Entertainment, Inc.](#), 195 Cal. App. 4th 612, 125 Cal. Rptr. 3d 680 (2d Dist. 2011), as modified, (June 1, 2011) and as modified on denial of reh'g, (June 13, 2011).  
One of the requirements for an equitable assets creditor's bill is that the debtor must have some interest in property that the creditor is unable to reach through execution. [Comcast of IL X v. Multi-Vision Electronics, Inc.](#), 504 F. Supp. 2d 740 (D. Neb. 2007); [Doksansky v. Norwest Bank Nebraska, N.A.](#), 260 Neb. 100, 615 N.W.2d 104 (2000).  
Under a state reach and apply statute, a partner's interest in partnership property may be reached and applied to satisfy a business debt. [Tilcon Capaldi, Inc. v. Feldman](#), 249 F.3d 54 (1st Cir. 2001).  
As to a creditor's bill to reach property fraudulently conveyed by a debtor, see Am. Jur. 2d, Fraudulent Conveyances and Transfers[[WestlawNext®\(r\) Search Query](#)].
- 2 [Venable v. Rickenberg](#), 152 Mass. 64, 24 N.E. 1083 (1890).
- 3 § 3.
- 4 [Matter of Leonard](#), 125 F.3d 543 (7th Cir. 1997).  
A creditor may “reach and apply” a debtor's interest in intangible property that cannot otherwise be executed against in an action at law, including a debtor's beneficial interest in trusts. [Tilcon Capaldi, Inc. v. Feldman](#), 249 F.3d 54 (1st Cir. 2001).
- 5 [Sweezy v. Jones](#), 65 Iowa 272, 21 N.W. 603 (1884); [Weil v. Raymond](#), 142 Mass. 206, 7 N.E. 860 (1886).
- 6 [Cannon Mills, Inc. v. Spivey](#), 208 Tenn. 419, 346 S.W.2d 266 (1961).
- 7 [Wm. R. Moore Dry Goods Co. v. Ford](#), 146 Ark. 227, 225 S.W. 320 (1920); [Florence v. Dunagan](#), 281 Ky. 25, 134 S.W.2d 970 (1939).
- 8 [Meyer v. Platt](#), 137 Neb. 714, 291 N.W. 86 (1940).  
As to exempt property, see § 28.

9                    [Greene v. Johnston](#), 34 Del. Ch. 115, 99 A.2d 627, 42 A.L.R.2d 906 (1953).  
10                   [Tierney v. Klein](#), 67 Miss. 173, 6 So. 739 (1889), [aff'd](#), 67 Miss. 173, 8 So. 424 (1889).  
11                   [Bethlehem Fabricators v. H.D. Watts Co.](#), 286 Mass. 556, 190 N.E. 828, 93 A.L.R. 1124 (1934).  
                      The reach and apply statute is very broadly written and contains no express reservation for cases in which  
                      an anti-assignment clause exists; the statute applies to interests containing self-imposed anti-assignment  
                      clauses. [Tilcon Capaldi, Inc. v. Feldman](#), 249 F.3d 54 (1st Cir. 2001) (applying Massachusetts law).  
12                   [Depner v. Joseph Zukin Blouses](#), 13 Cal. App. 2d 124, 56 P.2d 574 (3d Dist. 1936); [Brusman v. Susanjar](#),  
                      113 Ohio App. 544, 18 Ohio Op. 2d 181, 179 N.E.2d 125 (2d Dist. Miami County 1960).  
                      As to the right to interpose a defense which the defendant has against the judgment debtor, see § 68.  
13                   § 69.

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## 21 Am. Jur. 2d Creditors' Bills § 26

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill

#### A. In General

## § 26. Equitable estates or interests

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

Lands or personal property in which a debtor has an equitable estate or interest, the legal title being in another, may be reached by a creditor's bill,<sup>1</sup> regardless of whose hands such property may be in,<sup>2</sup> and this rule has sometimes been incorporated in statutes.<sup>3</sup> Similarly, equitable interests in shares of corporate stock can be reached by a creditor's bill.<sup>4</sup>

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### Footnotes

- <sup>1</sup> [Gibbs v. Blackwelder](#), 346 F.2d 943, 9 Fed. R. Serv. 2d 37A.22, Case 1 (4th Cir. 1965) (by implication); [Berger v. Dixon & Snow, P.C.](#), 868 P.2d 1149 (Colo. App. 1993).
- <sup>2</sup> [Dargan v. Waring](#), 11 Ala. 988, 1847 WL 321 (1847).
- <sup>3</sup> [Harris v. Beasley](#), 123 Tenn. 605, 133 S.W. 1110 (1911).  
A creditor's bill attacking the validity of a trust falls under the category of an “equitable assets” bill, which is a bill used to reach equitable assets or property of a debtor on which execution at law cannot be levied. [Comcast of IL X v. Multi-Vision Electronics, Inc.](#), 504 F. Supp. 2d 740 (D. Neb. 2007) (applying Nebraska law).
- <sup>4</sup> § 51.

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### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill

#### A. In General

## § 27. Interests under provisions for support

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

A proceeding in the nature of a creditor's bill may be maintained to reach the interest of the grantor in a deed requiring the grantee to pay an annual sum during the lifetime of the grantor.<sup>1</sup> On the other hand, the interest of a debtor under a contract by relatives to support him and pay him a small sum for life is not so reachable, on the ground that such an arrangement is peculiarly a personal one and incompatible with the substitution of a stranger in the place of either party.<sup>2</sup>

A testamentary provision that a devisee named in the will must support and care for a designated person creates no interest which may be reached by the creditors of the person for whom support is required to be furnished, notwithstanding such support and care are made a charge on the property bequeathed to such devisee; the duty imposed is a personal one, involving services rather than compensation, and is not convertible into a money claim either by the debtor or by his creditors.<sup>3</sup> Nor is this rule changed because the debtor was required to waive his or her distributive share in the testator's estate in order to receive the benefit of the provision made for his or her support in the will.<sup>4</sup> The right of support is in its nature inalienable, and a court of equity will not, at the suit of creditors, interfere to change the character of the property devised and the relation of the parties to it in order to defeat the intention of the testator.<sup>5</sup> However, where the will makes a gift of the whole income of the estate or of specific property, the fact that it is stated to be for the support of the beneficiary is not sufficient in itself to prevent equity from subjecting the interest of the beneficiary to the claims of his or her creditors.<sup>6</sup>

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### Footnotes

<sup>1</sup> [Keiser v. Shaw](#), 104 Ky. 119, 20 Ky. L. Rptr. 568, 46 S.W. 524 (1898).

As to whether the interest of a beneficiary of a trust for furnishing support or other purpose is subject to a creditor's bill, see §§ 35 to 39.

2 Valparaiso State Bank v. Schwartz, 92 Neb. 575, 138 N.W. 757 (1912).

3 Merchants' Nat. Bank v. Crist, 140 Iowa 308, 118 N.W. 394 (1908); Slattery v. Wason, 151 Mass. 266, 23 N.E. 843 (1890).

4 Merchants' Nat. Bank v. Crist, 140 Iowa 308, 118 N.W. 394 (1908).

5 Slattery v. Wason, 151 Mass. 266, 23 N.E. 843 (1890).

6 Maynard v. Cleaves, 149 Mass. 307, 21 N.E. 376 (1889).

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## 21 Am. Jur. 2d Creditors' Bills § 28

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill

#### A. In General

## § 28. Property exempt from levy under legal process

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

Property which is exempt from levy and sale under legal process either by general exemption statutes,<sup>1</sup> as a homestead<sup>2</sup> or because of public policy, cannot be reached by a creditor's bill.<sup>3</sup> Where a statute exempts banking institutions from the attachment laws, defining the public policy of the state toward such institutions, a creditor's bill cannot be maintained against the banking institution to recover money held by it in trust.<sup>4</sup> The interest which a debtor possesses under a trust in his or her favor is exempt under certain conditions.<sup>5</sup> If pension money has been declared free from attachment or any legal process by which it might be subjected to the debts of the pensioner, equity will not question any disposition of such funds which the pensioner may make.<sup>6</sup> Cemetery lots, which are generally exempt from seizure under execution or attachment,<sup>7</sup> are exempt in respect of a creditor's bill.<sup>8</sup>

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### Footnotes

- 1 As to such property, generally, see Am. Jur. 2d, Exemptions[[WestlawNext®\(r\) Search Query](#)].
- 2 As to homestead exemptions, generally, see Am. Jur. 2d, Homestead[[WestlawNext®\(r\) Search Query](#)].
- 3 [Provident Trust Co. v. Banks](#), 24 Del. Ch. 254, 9 A.2d 260 (1939).
- 4 [Provident Trust Co. v. Banks](#), 24 Del. Ch. 254, 9 A.2d 260 (1939).
- 5 §§ 34, 39.
- 6 [Falkenburg v. Johnson](#), 102 Ky. 543, 19 Ky. L. Rptr. 1606, 44 S.W. 80 (1898).
- 7 See Am. Jur. 2d, Cemeteries[[WestlawNext®\(r\) Search Query](#)].
- 8 [First Nat. Bank v. Hazel](#), 63 Neb. 844, 89 N.W. 378 (1902).



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## 21 Am. Jur. 2d Creditors' Bills § 29

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.


### III. Property Subject to Bill

#### A. In General

## § 29. Property in legal custody

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

Generally, a creditor's bill will not lie to reach funds in legal custody belonging to a debtor.<sup>1</sup> This general rule is analogous to the rule which the courts have formulated that interference with the possession of the court through attachment or execution is not to be permitted.<sup>2</sup> Under this rule the fees and compensation of an executor or administrator cannot be reached by a creditor during the administration of the estate and before they have been allowed by the probate court.<sup>3</sup> In addition, a creditor's bill against a fund paid into court in condemnation proceedings for highway purposes is premature where brought before any order of distribution allocating any sum to the debtor is made by the condemnation court holding the funds in custodia legis.<sup>4</sup> However, the seizure by the court of the debtor's property and the appointment of a receiver for it in a judgment creditor's suit present no obstacle to the obtaining of liens upon such property by other creditors who file similar bills; by filing such bills creditors will obtain priority over those whose claims have not been reduced to judgment, and among themselves in the order of the filing of their respective bills.<sup>5</sup>

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### Footnotes

- <sup>1</sup> [Cheff v. Athlone Industries, Inc.](#), 43 Del. Ch. 394, 233 A.2d 170 (1967); [Pierce v. Fortner](#), 64 Ohio App. 544, 18 Ohio Op. 244, 31 Ohio L. Abs. 696, 29 N.E.2d 165 (1st Dist. Butler County 1940).
- <sup>2</sup> See Am. Jur. 2d, Attachment and Garnishment[[WestlawNext®\(r\) Search Query](#)]; Am. Jur. 2d, Executions and Enforcement of Judgments[[WestlawNext®\(r\) Search Query](#)].
- <sup>3</sup> [Overturf v. Gerlach](#), 62 Ohio St. 127, 56 N.E. 653 (1900).
- <sup>4</sup> [Pierce v. Fortner](#), 64 Ohio App. 544, 18 Ohio Op. 244, 31 Ohio L. Abs. 696, 29 N.E.2d 165 (1st Dist. Butler County 1940).

5 [Russell v. Chicago Trust & Savings Bank, 139 Ill. 538, 29 N.E. 37 \(1891\).](#)

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## 21 Am. Jur. 2d Creditors' Bills § 30

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.


### III. Property Subject to Bill

#### A. In General

## § 30. Patents, trademarks, and copyrights

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### Forms

Am. Jur. Pleading and Practice Forms, Creditors' Bills—Forms Regarding Complaints and Petitions [[WestlawNext®\(r\)](#)  
[Search Query](#)]

A patent right may be subjected to the payments of the debts of the owner by a creditor's bill.<sup>1</sup> A debtor's interest in a trademark is also reachable by a creditor's bill.<sup>2</sup>

The property right of a debtor in a copyright, not being subject to seizure and sale under execution, is reachable by creditor's bill,<sup>3</sup> but in subjecting a copyright to its owner's debts by a sale thereof, it is necessary for the court to compel a transfer to the purchaser in conformity with the requirements of the copyright act in order to invest him or her with a complete title.<sup>4</sup>

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### Footnotes

- <sup>1</sup> [Ager v. Murray](#), 105 U.S. 126, 26 L. Ed. 942, 1881 WL 19730 (1881); [McClaskey v. Harbison-Walker Refractories Co.](#), 138 F.2d 493 (C.C.A. 3d Cir. 1943); [Olive Branch Holdings, L.L.C. v. Smith Technology Dev., L.L.C.](#), 181 Ohio App. 3d 479, 2009-Ohio-1105, 909 N.E.2d 671 (10th Dist. Franklin County 2009).

- 2 Warren v. Warren Thread Co., 134 Mass. 247, 1883 WL 10832 (1883).  
3 Ager v. Murray, 105 U.S. 126, 26 L. Ed. 942, 1881 WL 19730 (1881); Stephens v. Cady, 55 U.S. 528, 14  
How. 528, 14 L. Ed. 528, 1852 WL 6761 (1852).  
4 Stephens v. Cady, 55 U.S. 528, 14 How. 528, 14 L. Ed. 528, 1852 WL 6761 (1852).

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## 21 Am. Jur. 2d Creditors' Bills § 31

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.


### III. Property Subject to Bill

#### A. In General

## § 31. Membership in exchange

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

Membership in, or a seat on, a stock or similar exchange is property which may be reached by a creditor's bill,<sup>1</sup> although it has been said that such property may only be reached where the court can compel an involuntary transfer of the membership.<sup>2</sup> On the other hand, such a seat is not property but a mere license, which cannot be subjected to the claims of creditors.<sup>3</sup>

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### Footnotes

- 1 [Wagner v. Farmers' Co-op. Exch. Co. of Good Thunder](#), 147 Minn. 376, 180 N.W. 231, 14 A.L.R. 279 (1920); [Ulmann v. Thomas](#), 255 N.Y. 506, 175 N.E. 192 (1931).
- 2 [Ulmann v. Thomas](#), 255 N.Y. 506, 175 N.E. 192 (1931).
- 3 [W.G. Press & Co. v. Fahy](#), 313 Ill. 262, 145 N.E. 103 (1924).

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## 21 Am. Jur. 2d Creditors' Bills § 32

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill

#### A. In General

## § 32. Interests in decedent's estate

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

A debtor's interest in a decedent's estate is generally subject to a creditor's bill.<sup>1</sup> Specifically, the interest of an heir or distributee of a decedent's estate may be reached by a creditor's bill,<sup>2</sup> as may the interest of a legatee or devisee,<sup>3</sup> but the creditor of a legatee or devisee has no right to the equitable remedy while proceedings to probate the will are pending.<sup>4</sup>

The fact that an administrator is not subject to garnishment before an order of distribution has been made does not protect the administrator from a proceeding in the nature of a creditor's bill.<sup>5</sup> There is, however, authority to the effect that undistributed personalty in the administrator's hands cannot be reached by a bill filed by a creditor of the distributee.<sup>6</sup> In addition, where it is held that an heir's interest, even while the estate is in the process of administration, is reachable by an execution, such interest is not subject to a creditor's bill.<sup>7</sup> The courts have held, in cases involving the administration of estates, that the granting of relief to the creditor with respect to the debtor's interest in the estate does not constitute interference with the due administration of the estate by another court.<sup>8</sup> However, the jurisdiction of equity to afford relief in such cases has been denied by some courts on the ground of interference with the court having jurisdiction over the administration of the estate.<sup>9</sup>

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### Footnotes

- <sup>1</sup> [Miller v. Maryland Casualty Co.](#), 207 Ark. 312, 180 S.W.2d 581 (1944); [Hollingsworth v. Arcadia Citrus Growers Ass'n](#), 154 Fla. 399, 18 So. 2d 159 (1944); [Great Lakes Crushing, Ltd. v. DeMarco](#), 2014-Ohio-4316, 20 N.E.3d 430 (Ohio Ct. App. 11th Dist. Lake County 2014).
- As to interests under testamentary provisions for support, see § 27.
- As to particular interests in lands arising by devise, deed, or contract, see §§ 40 to 44.

- 2 Fremont Farmers Union Co-op. Ass'n v. Markussen, 136 Neb. 567, 286 N.W. 784, 123 A.L.R. 1287 (1939).  
Generally, as to availability of an heir's interest to the claims of creditors, see Am. Jur. 2d, Descent and  
Distribution[WestlawNext®(r) Search Query].
- 3 Miller v. Maryland Casualty Co., 207 Ark. 312, 180 S.W.2d 581 (1944); Schueler v. Althouse, 365 Mich.  
690, 113 N.W.2d 921 (1962); Great Lakes Crushing, Ltd. v. DeMarco, 2014-Ohio-4316, 20 N.E.3d 430  
(Ohio Ct. App. 11th Dist. Lake County 2014).
- 4 Cheff v. Athlone Industries, Inc., 43 Del. Ch. 394, 233 A.2d 170 (1967); Colclough v. Palmetto Nat. Bank,  
143 Ga. 336, 85 S.E. 107 (1915).
- 5 Johnston v. Byars State Bank, 1930 OK 43, 141 Okla. 277, 284 P. 862 (1930).  
As to whether the interest of an heir, devisee, or legatee, or a creditor of a decedent's estate, is attachable or  
garnishable (before distribution), see Am. Jur. 2d, Attachment and Garnishment [WestlawNext®(r) Search  
Query].
- 6 De Bardeleben Coal Corp. v. Parker, 164 Miss. 728, 144 So. 474 (1932).
- 7 Kalona Sav. Bank v. Eash, 133 Iowa 190, 109 N.W. 887 (1906).
- 8 Fremont Farmers Union Co-op. Ass'n v. Markussen, 136 Neb. 567, 286 N.W. 784, 123 A.L.R. 1287 (1939);  
Hull v. Vaughn, 171 Tenn. 642, 107 S.W.2d 219 (1937).
- 9 Bowden v. Parrish, 86 Va. 67, 9 S.E. 616 (1889); Williams v. Smith, 117 Wis. 142, 93 N.W. 464 (1903).

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## 21 Am. Jur. 2d Creditors' Bills III B Refs.

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill

#### B. Beneficial Interests in Trust Estates

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### A.L.R. Library

A.L.R. Index, Creditors' Bills

West's A.L.R. Digest, Debtor and Creditor 11

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## 21 Am. Jur. 2d Creditors' Bills § 33

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill

#### B. Beneficial Interests in Trust Estates

##### 1. In General

## § 33. Trust created by debtor for his or her own benefit

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

The interest of a debtor in a trust estate created by him for his own benefit may be reached by a creditor's bill.<sup>1</sup> If the settlor is the sole person entitled to income from the trust, such income can be reached by his or her creditors;<sup>2</sup> a provision in the trust agreement giving the trustee authority, in his or her discretion, to withhold the income from the settlor and to accumulate it does not in itself place the income beyond the reach of his or her creditors.<sup>3</sup> The fact that the trustee under such a trust, whose primary beneficiary is the settlor, may in his or her discretion pay or use the income for others, such as the settlor's spouse and children, does not change the rule, since the trustee might still pay all the income to the settlor, opening the way to the evasion by the settlor of his or her just debts.<sup>4</sup> In other words, the debtor will not be permitted to tie up his or her own property under a trust in such a manner that the debtor may be enabled to enjoy the income and set his or her creditors at defiance.<sup>5</sup>

The above principles are not changed by reason of the fact that the debtor acts through the instrumentality of a third person in creating a trust for the debtor's benefit; where the debtor's funds are placed by a third person in trust for the debtor, it is held that the trust is one created by the debtor and is reachable, although a statute excepts from the operation of creditors' bills trust funds proceeding from third persons.<sup>6</sup> Similarly, lands placed in trust by a debtor through the intervention of a third party, the entire income to be paid to the debtor, may be reached by a creditor's bill.<sup>7</sup>

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### Footnotes

- 1 [Greenwich Trust Co. v. Tyson](#), 129 Conn. 211, 27 A.2d 166 (1942); [Florence v. Dunagan](#), 281 Ky. 25, 134 S.W.2d 970 (1939).

Where a person creates for his or her own benefit a trust with a provision restraining the voluntary or involuntary transfer of his or her interest, the person's interest can be reached by his or her creditors. [Restatement Third, Trusts § 60.](#)

2 [Greenwich Trust Co. v. Tyson, 129 Conn. 211, 27 A.2d 166 \(1942\).](#)

Where a person creates for his or her own benefit a trust for support or a discretionary trust, the amounts a creditor can reach may be limited to provide for the beneficiary's needs, or the amounts may be increased where the beneficiary either is the settlor or holds the discretionary power to determine his or her own distributions. [Restatement Third, Trusts § 60.](#)

3 [Greenwich Trust Co. v. Tyson, 129 Conn. 211, 27 A.2d 166 \(1942\).](#)

4 [Greenwich Trust Co. v. Tyson, 129 Conn. 211, 27 A.2d 166 \(1942\).](#)

5 [Greenwich Trust Co. v. Tyson, 129 Conn. 211, 27 A.2d 166 \(1942\).](#)

6 [Schuhardt v. Wittcke, 76 N.J. Eq. 119, 76 A. 570 \(Ch. 1909\), aff'd, 78 N.J. Eq. 292, 78 A. 1135 \(Ct. Err. & App. 1911\).](#)

7 [McIlvaine v. Smith, 42 Mo. 45, 1867 WL 4907 \(1867\).](#)

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## 21 Am. Jur. 2d Creditors' Bills § 34

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill


#### B. Beneficial Interests in Trust Estates

##### 1. In General

## § 34. Trusts by operation of law

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### Forms

Am. Jur. Pleading and Practice Forms, Creditors' Bills—Forms Regarding Complaints and Petitions [[WestlawNext®\(r\)](#)  
[Search Query](#)]

It has often been found that a creditor's bill will lie to reach the interest of the debtor in a resulting or constructive trust<sup>1</sup> in personal property,<sup>2</sup> or in real estate, as where lands paid for by the judgment debtor are conveyed to a third person at his or her request,<sup>3</sup> an express trust,<sup>4</sup> or where an inter vivos express trust fails for technical reasons.<sup>5</sup> In various other situations creditors have successfully filed bills in equity to reach the interests of persons whose funds have been invested in property, the title being taken in the name of others,<sup>6</sup> particularly where the transaction has been effected with an intent to defraud creditors.<sup>7</sup>

### Caution:

Property paid for with exempt property of the debtor, title being taken in the name of his or her spouse or another, cannot be reached.<sup>8</sup> Moreover, property purchased by a debtor which would be exempt as a homestead if title had been taken in his or her

name cannot be reached by a creditor's bill where title was taken in the name of another person.<sup>9</sup> It should also be noted that in view of the rule that a creditor's bill is not available where there is an adequate remedy at law,<sup>10</sup> trusts by operation of law will not be subject to a creditor's bill in jurisdictions having statutory provisions for subjecting the interest of the beneficiary to levy under execution or attachment.<sup>11</sup>

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#### Footnotes

- 1 [Cavadi v. DeYeso, 458 Mass. 615, 941 N.E.2d 23 \(2011\).](#)
- 2 [As to resulting and constructive trusts, generally, see Am. Jur. 2d, Trusts\[WestlawNext®\(r\) Search Query\].](#)
- 3 [Hillsborough County v. Dickenson, 125 Fla. 181, 169 So. 734 \(1935\).](#)
- 4 [Hillsborough County v. Dickenson, 125 Fla. 181, 169 So. 734 \(1935\); Meyer v. Platt, 137 Neb. 714, 291 N.W. 86 \(1940\).](#)
- 5 [Cavadi v. DeYeso, 458 Mass. 615, 941 N.E.2d 23 \(2011\).](#)
- 6 [First Nat. Bank in Mitchell v. Daggett, 242 Neb. 734, 497 N.W.2d 358 \(1993\) \(debtor attempted to convey title to real property to trust with himself and his wife as beneficiaries\).](#)
- 7 [Southern Ry. Co. v. Hartshorne, 150 Ala. 217, 43 So. 583 \(1907\).](#)
- 8 [As to the purchase of property in name of a third person to defraud creditors, see Am. Jur. 2d, Fraudulent Conveyances and Transfers\[WestlawNext®\(r\) Search Query\].](#)
- 9 [Derby v. Weyrich, 8 Neb. 174, 1879 WL 3419 \(1879\).](#)
- 10 [Kleinert v. Lefkowitz, 271 Mich. 79, 259 N.W. 871 \(1935\).](#)
- 11 [§ 3.](#)
- 11 [See Am. Jur. 2d, Attachment and Garnishment\[WestlawNext®\(r\) Search Query\]; Am. Jur. 2d, Executions and Enforcement of Judgments § 159\[WestlawNext®\(r\) Search Query\].](#)

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## 21 Am. Jur. 2d Creditors' Bills § 35

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

#### III. Property Subject to Bill


##### B. Beneficial Interests in Trust Estates

##### 2. Trust Created by Third Person

## § 35. Trust created by third person generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

The general rule, subject to certain exceptions,<sup>1</sup> is that the interest of a debtor under an active trust created for his or her benefit by a third person may be reached by a creditor's bill unless it has been placed beyond the reach of his or her creditors by a valid provision in the instrument creating the trust.<sup>2</sup> In the absence of any statutory provision to the contrary,<sup>3</sup> the creditors of a beneficiary may reach the income of a trust where his or her right to the income is absolute, although the trustee is given discretionary power as to paying over any part of the principal.<sup>4</sup> However, in order for equity to subject to the claims of creditors the interest of the beneficiary, it is essential that it be such an interest as could be enforced by the beneficiary himself; creditors cannot reach the beneficiary's interest if the trustee has complete discretion not only as to the time and manner of conferring the intended benefit but also as to whether it will be conferred at all,<sup>5</sup> or if disbursements are restricted to such amounts as are necessary for the comfortable maintenance and support of the cestui que trust.<sup>6</sup>

A creditor's bill will not lie where no interest remains in the beneficiary, such as where, prior to the filing of the bill, the cestui que trust had, by a valid conveyance or assignment, parted with all interest, both legal and equitable, in the property sought to be appropriated.<sup>7</sup>

### Observation:

A creditor's bill cannot be used to obtain an order terminating a trust and requiring the distribution of the trust assets in which the judgment debtor has an equitable interest to the judgment creditor to satisfy its judgment.<sup>8</sup>

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Footnotes

- 1 §§ 36 to 39.
- 2 [Potter v. Couch](#), 141 U.S. 296, 11 S. Ct. 1005, 35 L. Ed. 721 (1891); [Miller v. Maryland Casualty Co.](#), 207 Ark. 312, 180 S.W.2d 581 (1944).  
See [Restatement Third, Trusts § 56](#), providing that creditors of a trust beneficiary, or of a deceased beneficiary's estate, can subject the interest of the beneficiary to the satisfaction of their claims, except insofar as a corresponding legal interest is exempt from creditors' claims.
- 3 § 39.
- 4 [Miller v. Maryland Casualty Co.](#), 207 Ark. 312, 180 S.W.2d 581 (1944).
- 5 [Louisville Tobacco Warehouse Co. v. Thompson](#), 172 Ky. 350, 189 S.W. 245 (1916); [Doksansky v. Norwest Bank Nebraska, N.A.](#), 260 Neb. 100, 615 N.W.2d 104 (2000).  
Subject to the rules on spendthrift trusts, if the terms of a trust provide for a beneficiary to receive distributions in the trustee's discretion, a transferee or creditor of the beneficiary is entitled to receive or attach any distributions the trustee makes or is required to make in the exercise of that discretion after the trustee has knowledge of the transfer or attachment. [Restatement Third, Trusts § 60](#).
- 6 [Seymour v. McAvoy](#), 121 Cal. 438, 53 P. 946 (1898); [Doksansky v. Norwest Bank Nebraska, N.A.](#), 260 Neb. 100, 615 N.W.2d 104 (2000).  
The former wife of a beneficiary of discretionary support trusts was not entitled to an equitable assets creditor's bill; even though the former wife had a judgment against the beneficiary which she was unable to satisfy through the legal remedy of execution, the beneficiary's interest in the trusts was not an interest in property which could have been reached by an equitable assets creditor's bill to satisfy a judgment for child support arrearage, due to the restricted purposes for which the assets could have been distributed to the beneficiary. [Doksansky v. Norwest Bank Nebraska, N.A.](#), 260 Neb. 100, 615 N.W.2d 104 (2000).
- 7 [Spindle v. Shreve](#), 111 U.S. 542, 4 S. Ct. 522, 28 L. Ed. 512 (1884).
- 8 [Great Lakes Crushing, Ltd. v. DeMarco](#), 2014-Ohio-4316, 20 N.E.3d 430 (Ohio Ct. App. 11th Dist. Lake County 2014).

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## 21 Am. Jur. 2d Creditors' Bills § 36

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill


#### B. Beneficial Interests in Trust Estates

#### 2. Trust Created by Third Person

## § 36. Remainder or reversionary interest

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

While a creditor's bill may be used to reach a remainder interest in a trust, a court of equity may refuse to order the sale of a vested remainderman's interest in order to satisfy a judgment against him or her where it is possible that the entire corpus might be consumed in caring for the life tenant, so that the value of the debtor's interest is speculative and might bring only a nominal amount if sold.<sup>1</sup> In addition, while the reversionary interest of a devisee of lands subject to a trust is subject to a creditor's bill, the creditor will be required first to resort to a sequestration of the income thereof which is held in trust in part for the benefit of the debtor.<sup>2</sup>

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### Footnotes

- <sup>1</sup> [Mid-America Corp. v. Geismar](#), 1963 OK 65, 380 P.2d 85 (Okla. 1963).  
Generally, as to whether remainder interests in land are subject to creditors' bills, see [§ 43](#).
- <sup>2</sup> [May v. Bryan](#), 17 App. D.C. 392, 1901 WL 19155 (App. D.C. 1901).  
As to reversions, generally, see [§ 43](#).

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## 21 Am. Jur. 2d Creditors' Bills § 37

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill


#### B. Beneficial Interests in Trust Estates

#### 2. Trust Created by Third Person

## § 37. Annuities

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

Where the interest of a debtor in a trust fund proceeding from some third person is, by statute, excepted from the operation of a creditor's bill,<sup>1</sup> an annuity, payable from a fund placed by a third person in trust for the debtor, may not be reached.<sup>2</sup> However, an annuity charged on realty for the support of the annuitant which is not within such or another statutory exception may be reached by a creditor's bill.<sup>3</sup>

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### Footnotes

- <sup>1</sup> § 39.
- <sup>2</sup> [Frazier v. Barnum](#), 19 N.J. Eq. 316, 1868 WL 4198 (Ch. 1868).
- <sup>3</sup> [Gifford v. Rising](#), 3 N.Y.S. 392 (Sup 1889).

End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 38

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill

#### B. Beneficial Interests in Trust Estates

#### 2. Trust Created by Third Person

## § 38. Spendthrift trusts

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

In those jurisdictions recognizing the validity of spendthrift trusts<sup>1</sup> the grantor, by providing that the interest of the beneficiary will not be alienable by him or her or subject to be taken by the beneficiary's creditors, may prevent a creditor of the beneficiary from reaching the latter's interest by a bill in equity.<sup>2</sup> Where a testator has provided that the income from a trust fund created for the benefit of his or her child must cease in the event of the filing of a creditor's bill against him or her and must thereafter be paid to the child's family for their support, the income is not reachable.<sup>3</sup>

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### Footnotes

- <sup>1</sup> As to spendthrift trusts, generally, see Am. Jur. 2d, Trusts[[WestlawNext®\(r\) Search Query](#)].
- <sup>2</sup> [Roberts v. Stevens](#), 84 Me. 325, 24 A. 873 (1892); [Broadway Nat. Bank v. Adams](#), 133 Mass. 170, 1882 WL 11039 (1882); [Wetmore v. Wetmore](#), 149 N.Y. 520, 44 N.E. 169 (1896); [Garland v. Garland](#), 87 Va. 758, 13 S.E. 478 (1891).  
See [Restatement Third, Trusts § 58\(1\)](#), to the effect that except as otherwise stated, and subject to the rules on ownership equivalence and exceptions particular types of claims, if the terms of a trust provide that a beneficial interest is not transferable by the beneficiary or subject to claims of the beneficiary's creditors, the restraint on voluntary and involuntary alienation of the interest is valid.
- <sup>3</sup> [Bramhall v. Ferris](#), 14 N.Y. 41, 1856 WL 6749 (1856).

End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 39

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill


#### B. Beneficial Interests in Trust Estates

#### 2. Trust Created by Third Person

## § 39. Effect of statutes

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### Forms

Am. Jur. Pleading and Practice Forms, Creditors' Bills—Forms Regarding Complaints and Petitions [[WestlawNext®\(r\)](#)  
[Search Query](#)]

In some jurisdictions the interest of a debtor in a trust fund proceeding from some third person is, by statute, excepted from the operation of a creditor's bill.<sup>1</sup> Therefore, by statute in many states, the interest of a debtor under a trust for his or her benefit alone is subject to execution,<sup>2</sup> and where this constitutes an adequate legal remedy, a creditor's bill cannot be used to reach a beneficiary's interest.<sup>3</sup>

On the other hand, there are statutes providing that estates held in trust must be subject to the debts of the beneficiary as they would be subject if the beneficiary was the legal owner of such property; under such a statute, a limited discretion granted the trustee which does not deprive the beneficiary of all enforceable rights does not take away the power of equity to subject the beneficiary's interest to the claims of creditors if it would otherwise be liable.<sup>4</sup> However, where under such a statute full control and discretion is granted the trustee under a testamentary trust, a creditor's bill may not be used to subject the interest of the beneficiary to a creditor's claim.<sup>5</sup>

Under some statutes, only the surplus income in the hands of trustees which is not necessary for the support of the debtor may be reached by a creditor's bill, and where there is no excess over such amount, the debtor's interest cannot be touched.<sup>6</sup> However, under such statutes, where there is a surplus available, it is not limited to accumulated surplus; creditors may be awarded surplus to accrue in the future.<sup>7</sup> A statute authorizing the subjection of surplus income to the claims of creditors is not in conflict with other statutory provisions exempting trust interest from being subjected to liability under an execution.<sup>8</sup>

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Footnotes

- 1 [Spindle v. Shreve](#), 111 U.S. 542, 4 S. Ct. 522, 28 L. Ed. 512 (1884); [Von Kesler v. Scully](#), 267 Ill. App. 495, 1932 WL 2600 (1st Dist. 1932), cert. denied.
- 2 [Am. Jur. 2d, Executions and Enforcement of Judgments](#)[[WestlawNext®\(r\) Search Query](#)].
- 3 [Restatement Third, Trusts § 56](#), comment e.
- 4 [Marshall's Trustee v. Rash](#), 87 Ky. 116, 9 Ky. L. Rptr. 963, 7 S.W. 879 (1888).
- 5 [Louisville Tobacco Warehouse Co. v. Thompson](#), 172 Ky. 350, 189 S.W. 245 (1916).
- 6 [Wetmore v. Wetmore](#), 149 N.Y. 520, 44 N.E. 169 (1896).
- 7 [Wetmore v. Wetmore](#), 149 N.Y. 520, 44 N.E. 169 (1896); [In re Brown's Estate](#), 35 N.Y.S.2d 646 (Sup 1941), judgment aff'd, 264 A.D. 824, 35 N.Y.S.2d 738 (4th Dep't 1942).
- 8 [Spring v. Randall](#), 107 Mich. 103, 64 N.W. 1063 (1895).

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## 21 Am. Jur. 2d Creditors' Bills III C Refs.

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill

#### C. Particular Interests in Land

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### A.L.R. Library

A.L.R. Index, Creditors' Bills

West's A.L.R. Digest, Debtor and Creditor 11

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## 21 Am. Jur. 2d Creditors' Bills § 40

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill

#### C. Particular Interests in Land

## § 40. Contracts for purchase of land

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

Generally, the interest of a debtor in lands purchased by him or her under contract, the legal title remaining in the vendor, may be reached by a creditor's bill.<sup>1</sup> However, a rule to the contrary may be applied in some jurisdictions where statutes render such an interest subject to execution,<sup>2</sup> in which case the existence of an adequate legal remedy precludes equitable relief.<sup>3</sup>

Although an option to purchase land cannot be reached by a creditor's bill,<sup>4</sup> there is authority to the effect that a debtor's interest in a lease containing an option to purchase at a price fixed in the lease is subject to a creditor's bill.<sup>5</sup>

A vendor's lien may be reached by a creditor's bill.<sup>6</sup>

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### Footnotes

- 1 [McNab v. Heald](#), 41 Ill. 326, 1866 WL 4591 (1866); [Withers v. Carter](#), 45 Va. 407, 4 Gratt. 407, 1848 WL 2783 (1848).
- 2 See Am. Jur. 2d, Executions and Enforcement of Judgments[[WestlawNext®\(r\) Search Query](#)].
- 3 [§ 3](#).
- 4 [Sweezy v. Jones](#), 65 Iowa 272, 21 N.W. 603 (1884).
- 5 [Eastern Bridge & Structural Co. v. Worcester Auditorium Co.](#), 216 Mass. 426, 103 N.E. 913 (1914).
- 6 [Edwards v. Edwards](#), 24 Ohio St. 402, 1873 WL 78 (1873).

## 21 Am. Jur. 2d Creditors' Bills § 41

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill

#### C. Particular Interests in Land

## § 41. Interest of mortgagor; redemption rights

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

If the property right of a mortgagor is recognized to constitute the legal title, as it is in many jurisdictions,<sup>1</sup> then it is subject to execution rather than to a creditor's bill. Moreover, if by virtue of statute or the possession of the premises by the mortgagor, the mortgagor's interest is rendered subject to execution without reference to its legal or equitable character in fact, the situation is such that an equitable remedy by creditor's bill is precluded, the legal remedy being adequate.<sup>2</sup>

Where the right to redeem property sold under execution is regarded as a legal rather than an equitable right, it cannot be reached by a creditor's bill.<sup>3</sup> A creditor who has sold lands of his or her debtor under execution cannot maintain a bill in equity to subject the debtor's right to redeem from the sale to the payment of the balance of the judgment, ample remedy at law being given in such a case.<sup>4</sup> A creditor's bill will lie to reach the interest of the debtor under a conveyance by him or her to a trustee to sell and pay certain debts, a reconveyance to be made on the payment thereof,<sup>5</sup> and to reach the surplus arising from the sale of mortgaged property.<sup>6</sup>

In some jurisdictions where the debtor holds property subject to a deed of trust or a mortgage securing debts past due, a judgment creditor may in equity cause a foreclosure to be made and reach the equity of the debtor.<sup>7</sup> It is also well settled that a creditor's bill will lie to have a deed by the debtor declared a mortgage and to subject the equity of the debtor to the payment of the judgment of the plaintiff,<sup>8</sup> and that the right of a mortgagor to require a mortgagee in possession to account for rents and profits is reachable by such a bill.<sup>9</sup>

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Footnotes

- 1 Am. Jur. 2d, Mortgages[WestlawNext®(r) Search Query].
- 2 George E. Sebring Co. v. O'Rourke, 101 Fla. 885, 134 So. 556 (1931).
- 3 Watson v. Reissig, 24 Ill. 281, 1860 WL 6403 (1860); Ewing v. Cook, 85 Tenn. 332, 3 S.W. 507 (1887).
- 4 Ewing v. Cook, 85 Tenn. 332, 3 S.W. 507 (1887).
- 5 McRary v. Fries, 57 N.C. 233, 4 Jones Eq. 233, 1858 WL 1862 (1858).
- 6 Judge v. Herbert, 124 Mass. 330, 1878 WL 10820 (1878); Kickbusch v. Corwith, 108 Wis. 634, 85 N.W. 148 (1901).
- 7 Harris v. Beasley, 123 Tenn. 605, 133 S.W. 1110 (1911).
- 8 Kidd v. Kidd, 158 Ga. 546, 124 S.E. 45, 36 A.L.R. 798 (1924); Gray v. Folwell, 57 N.J. Eq. 446, 41 A. 869 (Ch. 1898).
- 9 Anderson v. Lanterman, 27 Ohio St. 104, 1875 WL 153 (1875).

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 42

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill

#### C. Particular Interests in Land

## § 42. Interest of mortgagee

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

Where choses in action are proper subjects of creditors' bills, either according to general principles of equity<sup>1</sup> or under statutes,<sup>2</sup> the debt secured by a mortgage could at least arguably be a subject of such remedy. Looking beyond the mere debt secured, there is some authority for the rule that a mortgagee has an interest in the mortgaged property which may be applied by equity in payment of his or her debt.<sup>3</sup> On the other hand, the application of the principle that relief by creditor's bill will be denied if the creditor has an adequate remedy at law operates to prevent the use of such remedy to subject a mortgagee's interest to the payment of his or her debt, in jurisdictions where the creditor is able to have such interest seized under legal process of an attachment.<sup>4</sup>

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### Footnotes

<sup>1</sup> § 45.

<sup>2</sup> § 46.

<sup>3</sup> *Cohen v. Carroll*, 13 Miss. 545, 5 S. & M. 545, 1846 WL 1611 (1846).

<sup>4</sup> See Am. Jur. 2d, Attachment and Garnishment[[WestlawNext®\(r\) Search Query](#)].

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## 21 Am. Jur. 2d Creditors' Bills § 43

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.


### III. Property Subject to Bill

#### C. Particular Interests in Land

## § 43. Remainder or reversion

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

A remainder is not subject to the equitable remedy of a creditor's bill unless there is no adequate legal remedy whereby it may be reached.<sup>1</sup> Subject to the foregoing limitation, a vested estate in remainder is subject to a creditor's bill.<sup>2</sup> On the other hand, a contingent remainder is generally not reachable by a creditor's bill.<sup>3</sup> However, where the debtor has a vested interest in a contingent remainder or the interest in a contingent remainder is alienable by the holder, it is subject to a creditor's bill.<sup>4</sup> Phrased differently, it has been said that a contingent remainder may be reached by a creditor's bill if the interest represented thereby is something more than a mere possibility.<sup>5</sup>

There is authority for the proposition that a reversion is subject to a creditor's bill where there is no legal process through which it may be appropriated to the payment of the reversioner's debts during the continuance of the preceding estate.<sup>6</sup>

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### Footnotes

- <sup>1</sup> §§ 3, 25.
- <sup>2</sup> *Mears v. Lamona*, 17 Wash. 148, 49 P. 251 (1897).
- <sup>3</sup> *National Bank of Commerce of St. Louis v. Ritter*, 181 Ark. 439, 26 S.W.2d 113 (1930); *Kenwood Trust & Savings Bank v. Palmer*, 285 Ill. 552, 121 N.E. 186 (1918).
- <sup>4</sup> *Clarke v. Fay*, 205 Mass. 228, 91 N.E. 328 (1910); *Cashman v. Bangs*, 200 Mass. 498, 86 N.E. 932 (1909).
- <sup>5</sup> *Clarke v. Fay*, 205 Mass. 228, 91 N.E. 328 (1910); *Alexander v. McPeck*, 189 Mass. 34, 75 N.E. 88 (1905).
- <sup>6</sup> *Burton v. Smith*, 38 U.S. 464, 10 L. Ed. 248, 1839 WL 4335 (1839).

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 44

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill

#### C. Particular Interests in Land

## § 44. Interest of cotenant

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

Ordinarily, since an interest in lands as tenant in common may be seized by legal process,<sup>1</sup> the legal remedy is adequate and a creditor's bill will not lie to subject such interest to the payment of a judgment against the owner. However, where a statute provides that after the return of an execution nulla bona, a creditor may resort to an equitable action to subject an equitable or legal interest and all other property of the debtor to the satisfaction of the judgment, the interest of a cotenant may be made the subject of a creditor's bill.<sup>2</sup>

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### Footnotes

<sup>1</sup> See Am. Jur. 2d, Attachment and Garnishment[[WestlawNext®\(r\) Search Query](#)]; Am. Jur. 2d, Executions and Enforcement of Judgments[[WestlawNext®\(r\) Search Query](#)].

<sup>2</sup> [Clements v. Waters](#), 90 Ky. 96, 11 Ky. L. Rptr. 880, 13 S.W. 431 (1890).

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills III D Refs.

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill

#### D. Choses in Action

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### A.L.R. Library

A.L.R. Index, Creditors' Bills

West's A.L.R. Digest, Debtor and Creditor 11

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## 21 Am. Jur. 2d Creditors' Bills § 45

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill


#### D. Choses in Action

##### 1. In General

## § 45. Choses in action generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### Forms

Am. Jur. Pleading and Practice Forms, Creditors' Bills—Forms Regarding Complaints and Petitions [[WestlawNext®\(r\)](#)  
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The question whether a chose in action may be subjected to a creditor's bill depends initially upon the absence of a remedy at law hereunder such property may be appropriated for the payment of a judgment.<sup>1</sup> Assuming that no adequate remedy at law is available, the courts are not agreed as to whether, in the absence of statutory authority,<sup>2</sup> a court exercising equitable jurisdiction can entertain a creditor's bill to reach a debtor's choses in action. Some courts hold that choses in action may be subjected to the payment of a judgment by a creditor's bill,<sup>3</sup> while other authorities have held that in the absence of some independent equitable ground for interference, choses in action cannot be reached.<sup>4</sup>

Some jurisdictions draw a distinction between assignable and nonassignable claims, holding that claims which are personal in nature cannot be reached by a creditor's bill.<sup>5</sup> A judgment debtor's claim for personal injuries against a third person<sup>6</sup> or the latter's liability insurer<sup>7</sup> have been held not subject to a creditor's bill. Furthermore, a claim of the judgment debtor cannot be reached if it is subject to an offset in excess of the amount thereof, notwithstanding he has given ample security for the payment of the indebtedness asserted in the offset.<sup>8</sup>

**Practice Tip:**

While a judgment creditor may recover an equitable lien on the proceeds of a breach of contract claim by the judgment debtor in a creditor's bill proceeding, the judgment creditor does not have the right to prosecute or direct the litigation of such claim.<sup>9</sup>

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**Footnotes**

- 1                    §§ 3, 25.  
See also the discussion of statutory proceedings supplementary to execution, in § 6, and attachment and garnishment statutes, in § 7, which may provide legal remedies operating to the exclusion of the equitable remedy of a creditor's bill.
- 2                    § 46.
- 3                    *Boston Property Exchange Transfer Co. v. Iantosca*, 834 F. Supp. 2d 4 (D. Mass. 2011), *aff'd*, 720 F.3d 1, 85 Fed. R. Serv. 3d 934 (1st Cir. 2013); *Berger v. Dixon & Snow, P.C.*, 868 P.2d 1149 (Colo. App. 1993) (claim of restitution may be reached); *Lakeshore Motor Freight [Co.] v. Glenway Industries, [Inc.]*, 2 Ohio App. 3d 8, 440 N.E.2d 567 (1st Dist. Hamilton County 1981) (breach of contract claim).  
A cause of action is a valuable interest vested in the defendant which can be reached and applied in a creditor's suit. *Cahaly v. Benistar Property Exchange Trust Co., Inc.*, 68 Mass App. Ct. 668, 864 N.E.2d 548 (2007), *aff'd*, 451 Mass 343, 885 N.E.2d 800 (2008).  
As to parties defendant, see § 62.
- 4                    *Harford Bank of Bel Air v. Havre de Grace Banking & Trust Co.*, 165 Md. 454, 169 A. 315 (1933); *Alms & Doepke Co. v. Johnson*, 98 Ohio App. 78, 57 Ohio Op. 177, 128 N.E.2d 250, 51 A.L.R.2d 588 (1st Dist. Hamilton County 1954).  
As to whether interests under life or property insurance policies are subject to creditors' bills, see §§ 53, 54. As to whether choses in action involving corporate stock or stockholders are subject to creditors' bills, see §§ 51, 52.
- 5                    *Scarlett v. Barnes*, 121 B.R. 578 (W.D. Mo. 1990); *Certified Grocers of California, Ltd v. San Gabriel Valley Bank*, 150 Cal. App. 3d 281, 197 Cal. Rptr. 710 (2d Dist. 1983).
- 6                    § 47.
- 7                    § 54.
- 8                    *Daugherty v. Bogy*, 104 F. 938 (8th Cir. 1900).
- 9                    *Lakeshore Motor Freight [Co.] v. Glenway Industries, [Inc.]*, 2 Ohio App. 3d 8, 440 N.E.2d 567 (1st Dist. Hamilton County 1981).

End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 46

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill


#### D. Choses in Action

##### 1. In General

## § 46. Under statutes

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### Forms

Am. Jur. Pleading and Practice Forms, Creditors' Bills—Forms Regarding Complaints and Petitions [[WestlawNext®\(r\)](#)  
[Search Query](#)]

In some jurisdictions the question whether a chose in action is subject to a creditor's bill is answered by statutes which expressly make this kind of property subject to the remedy.<sup>1</sup> Such statutes have been held to apply to unliquidated claims not sounding in tort<sup>2</sup> and to royalties due and to become due to an author,<sup>3</sup> and the reduction of a chose in action to judgment has been held not to place it beyond the reach of a creditor of the owner under such a statute.<sup>4</sup> However, it has been stated that a statute giving a remedy in equity to reach and apply in payment of debts any property, right, title, or interest, legal or equitable, of the debtor, does not cover choses in action which from their nature cannot be assigned by the debtor.<sup>5</sup>

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### Footnotes

- <sup>1</sup> [Bethlehem Fabricators v. H.D. Watts Co.](#), 286 Mass. 556, 190 N.E. 828, 93 A.L.R. 1124 (1934); [Bragg v. Gaynor](#), 85 Wis. 468, 55 N.W. 919 (1893).



- 2 Merriwether v. Bell, 139 Ky. 402, 22 Ky. L. Rptr. 844, 58 S.W. 987 (1900).  
3 Lord v. Harte, 118 Mass. 271, 1875 WL 9169 (1875).  
4 Bethlehem Fabricators v. H.D. Watts Co., 286 Mass. 556, 190 N.E. 828, 93 A.L.R. 1124 (1934).  
5 Bethlehem Fabricators v. H.D. Watts Co., 286 Mass. 556, 190 N.E. 828, 93 A.L.R. 1124 (1934).

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 47

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill

#### D. Choses in Action

##### 1. In General

## § 47. Tort claims

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor  11

Tort claims in which the wrong is regarded as one to the person, rather than an injury affecting the estate or property of the debtor, may not be reached by a creditor's bill.<sup>1</sup> Similarly, a right of action for personal torts, such as legal malpractice<sup>2</sup> cannot be reached by a creditor's bill. Nor can a creditor's bill be used to reach a verdict for personal injuries before judgment has been entered thereon.<sup>3</sup>

On the other hand, a creditor's suit may be instituted to enforce a chose in action of the judgment debtor arising from torts committed on the debtor's property.<sup>4</sup> In addition, a cause of action based on conversion and breach of fiduciary duty can be reached by a creditor's bill.<sup>5</sup> A cause of action sounding in tort may, if assignable, be reached by bills in equity under statutes authorizing creditors to bring suits in equity to reach interests which cannot be reached by process of attachment or execution.<sup>6</sup> The fact that the cause of action sought to be reached is in controversy when the creditor's bill is filed and the fact that the claim may prove valueless on the termination of legal proceedings thereon do not render it so conjectural as to put it beyond the scope of the remedy under such statute.<sup>7</sup>

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### Footnotes

- <sup>1</sup> [Scarlett v. Barnes](#), 121 B.R. 578 (W.D. Mo. 1990); [White Sewing Mach. Co. v. Morrison](#), 232 Mass. 387, 122 N.E. 291 (1919).
- <sup>2</sup> [Scarlett v. Barnes](#), 121 B.R. 578 (W.D. Mo. 1990); [Berger v. Dixon & Snow, P.C.](#), 868 P.2d 1149 (Colo. App. 1993).

- 3 [Bennett v. Sweet](#), 171 Mass. 600, 51 N.E. 183 (1898).
- 4 [Staples v. May](#), 87 Cal. 178, 25 P. 346 (1890) (tortious removal of ore beneath property of judgment debtor by miner operating on adjoining property).
- 5 [Certified Grocers of California, Ltd v. San Gabriel Valley Bank](#), 150 Cal. App. 3d 281, 197 Cal. Rptr. 710 (2d Dist. 1983).
- 6 [Bethlehem Fabricators v. H.D. Watts Co.](#), 286 Mass. 556, 190 N.E. 828, 93 A.L.R. 1124 (1934) (claim for interference with a contract).
- 7 [Bethlehem Fabricators v. H.D. Watts Co.](#), 286 Mass. 556, 190 N.E. 828, 93 A.L.R. 1124 (1934).

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 48

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill

#### D. Choses in Action

#### 2. Claims Against Governmental and Public Bodies

## § 48. Claims against United States or state

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

Officers of the United States, and of the different states, having money in their hands to which certain individuals are entitled, are not, in the absence of statutory authorization, liable to the creditors of those individuals under the process of attachment or garnishment.<sup>1</sup> Similarly, such money cannot be reached by a creditor's bill.<sup>2</sup> A debt owed by a state to the judgment debtor cannot be reached by a creditor's bill,<sup>3</sup> notwithstanding a statute subjecting choses in action to such bills.<sup>4</sup>

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### Footnotes

- <sup>1</sup> See Am. Jur. 2d, Attachment and Garnishment[[WestlawNext®\(r\) Search Query](#)].
- <sup>2</sup> [Wilson v. Central Vermont Ry. Co.](#), 239 Mass. 80, 131 N.E. 169 (1921); [Dow v. Irwin](#), 1915-NMSC-009, 21 N.M. 576, 157 P. 490 (1915).
- <sup>3</sup> [Massachusetts Elec. Co. v. Athol One, Inc.](#), 391 Mass. 685, 462 N.E.2d 1370 (1984).
- <sup>4</sup> [Divine v. Harvie](#), 23 Ky. 439, 7 T.B. Mon. 439, 1828 WL 1295 (1828) (a demand on the state is not a chose in action within such a statute).

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## 21 Am. Jur. 2d Creditors' Bills § 49

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill


#### D. Choses in Action

#### 2. Claims Against Governmental and Public Bodies

## § 49. Claims against counties and municipal corporations

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

The rule that in the absence of an express statutory provision a county cannot be subjected to the process of garnishment<sup>1</sup> is ordinarily applicable to an equity proceeding in the nature of a creditor's bill to reach moneys due and owing to a judgment debtor by a county.<sup>2</sup> However, in some jurisdictions such relief has been granted where the court could ascertain that no inconvenience could thereby result to the public.<sup>3</sup>

The consideration which exempts officers of the national and state governments from the process of garnishment, so far as the public funds entrusted to them are concerned,<sup>4</sup> in the absence of statutes to the contrary, applies with equal force to cities, towns, and other municipal corporations, and to preclude a resort to a creditor's bill to reach a claim of a debtor against such corporations.<sup>5</sup> Other authorities, however, have considered the nature of the claim against the public body in determining whether it was reachable,<sup>6</sup> and hold that the remedy by creditor's bill will not be allowed in any case where it is adjudged that the public will be injuriously affected;<sup>7</sup> and there is some authority for the rule that a claim against a municipality is not reachable, and a creditor's bill will not lie to compel garnishment unless such indebted makes no objection to the proceeding.<sup>8</sup> In some jurisdictions, a claim against a municipality is rendered subject to a creditor's bill by statute.<sup>9</sup>

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### Footnotes

<sup>1</sup> See Am. Jur. 2d, Attachment and Garnishment[[WestlawNext®\(r\) Search Query](#)].

- 2                   Jaffe v. McAdory, 202 Ala. 53, 79 So. 391 (1918); Clark v. Board of Com'rs of Osage County, 1916 OK  
1002, 62 Okla. 7, 161 P. 791 (1916) (overruled on other grounds by, Boren v. Thompson & Associates, 2000  
OK 3, 999 P.2d 438 (Okla. 2000)).
- 3                   Riggin v. Hilliard, 56 Ark. 476, 20 S.W. 402 (1892); Clarke v. Bert, 2 Kan. App. 407, 42 P. 733 (1895).
- 4                   See Am. Jur. 2d, Attachment and Garnishment[WestlawNext®(r) Search Query].
- 5                   Wallace v. Lawyer, 54 Ind. 501, 1876 WL 6587 (1876) (overruled in part on other grounds by, Fowler v.  
Griffin, 83 Ind. 297, 1882 WL 19964 (1882)); Geist v. City of St. Louis, 156 Mo. 643, 57 S.W. 766 (1900).
- 6                   Geist v. City of St. Louis, 156 Mo. 643, 57 S.W. 766 (1900).
- 7                   Riggin v. Hilliard, 56 Ark. 476, 20 S.W. 402 (1892).
- 8                   Baird v. Rogers, 95 Tenn. 492, 32 S.W. 630 (1895).
- 9                   Parsons v. Cathers, 92 Neb. 525, 138 N.W. 747 (1912).

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 50

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill

#### D. Choses in Action

#### 2. Claims Against Governmental and Public Bodies

## § 50. Claims against counties and municipal corporations —Claim of public contractor or for salary of public officer

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

A claim against a municipality for public work cannot be reached by a creditor's bill,<sup>1</sup> although other authority holds that the sum due the contractor may be reached by a creditor's bill if it is apparent that the public will not be inconvenienced, as where the building for which the debt was contracted has been completed.<sup>2</sup>

According to some authorities a claim for salary as a public officer of a municipality is not reachable,<sup>3</sup> and a creditor's bill will not lie to compel such officer to set aside a part of his or her salary for the payment of his or her debts.<sup>4</sup> Other courts have held, however, that the salary of a public officer earned at the time of the institution of a creditor's suit is reachable.<sup>5</sup>

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### Footnotes

- 1 [Addyston Pipe & Steel Co. v. City of Chicago](#), 170 Ill. 580, 48 N.E. 967 (1897) (overruled on other grounds by, [Henderson v. Foster](#), 59 Ill. 2d 343, 319 N.E.2d 789 (1974)).
- 2 [Plummer & Davis v. School Dist. No. 1 of Marianna](#), 90 Ark. 236, 118 S.W. 1011 (1909).
- 3 [Wallace v. Lawyer](#), 54 Ind. 501, 1876 WL 6587 (1876) (overruled in part on other grounds by, [Fowler v. Griffin](#), 83 Ind. 297, 1882 WL 19964 (1882)); [Geist v. City of St. Louis](#), 156 Mo. 643, 57 S.W. 766 (1900).
- 4 [Dickinson v. Johnson](#), 110 Ky. 236, 22 Ky. L. Rptr. 1686, 61 S.W. 267 (1901).
- 5 [Speed v. Brown](#), 49 Ky. 108, 10 B. Mon. 108, 1849 WL 3547 (1849).

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills III E Refs.

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.


### III. Property Subject to Bill

#### E. Interests and Liabilities of Corporate Stockholders

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### A.L.R. Library

A.L.R. Index, Creditors' Bills

West's A.L.R. Digest, Debtor and Creditor 11

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## 21 Am. Jur. 2d Creditors' Bills § 51

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill

#### E. Interests and Liabilities of Corporate Stockholders

## § 51. Interests in shares of corporate stock

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### Forms

Am. Jur. Pleading and Practice Forms, Creditors' Bills—Forms Regarding Complaints and Petitions [\[WestlawNext®\(r\) Search Query\]](#)

Although statutes which render shares of stock subject to attachment or garnishment,<sup>1</sup> and to levy under execution,<sup>2</sup> have made the use of creditors' bills ordinarily unnecessary as regards the reaching of a debtor's interest in corporate stock, there nevertheless may be occasion for the use of a creditor's bill to reach that interest; the process of attachment by which intangible property, including shares of corporate stock, is taken at law is wholly statutory, and stock shares may be subjected to seizure and sale in equity aside from statute, and therefore, such seizure and sale is not subject to the limitations of the statute authorizing the attachment of interests in shares of stock appearing on the corporation records.<sup>3</sup> It has also been found that equitable interests in shares of corporate stock can be reached by a creditor's bill.<sup>4</sup> So, generally, where there is no adequate remedy at law, the interest of a debtor in corporate stock may be reached by a creditor's bill.<sup>5</sup>

Under some statutes corporate stock is expressly made reachable by a creditor's bill.<sup>6</sup> In addition, there is authority for the proposition that stock in a foreign corporation may be reached by a creditor's bill where the statutes provide that choses in action are subject to this remedy.<sup>7</sup>

Unpaid subscriptions to the capital stock of a corporation may generally be reached by a creditor's bill to satisfy a judgment against the corporation.<sup>8</sup>

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Footnotes

- 1 Am. Jur. 2d, Attachment and Garnishment[WestlawNext®(r) Search Query].
- 2 As to statutes authorizing levy and sale on execution against shares of stock, see Am. Jur. 2d, Executions and Enforcement of Judgments § 150[WestlawNext®(r) Search Query].
- 3 Greene v. Johnston, 34 Del. Ch. 115, 99 A.2d 627, 42 A.L.R.2d 906 (1953).
- 4 Anderton v. Hiter, 238 Ala. 76, 188 So. 904 (1939); Greene v. Johnston, 34 Del. Ch. 115, 99 A.2d 627, 42 A.L.R.2d 906 (1953).
- 5 Greene v. Johnston, 34 Del. Ch. 115, 99 A.2d 627, 42 A.L.R.2d 906 (1953); Central Mortg. Co. v. Buff, 278 Mass. 233, 179 N.E. 628 (1932).
- 6 Brightwell v. Mallory, 18 Tenn. 196, 10 Yer. 196, 1836 WL 1210 (1836).  
See also Hurley v. Boston R. Holding Co., 315 Mass. 591, 54 N.E.2d 183 (1944), distinguishing a shareholder from a creditor of a corporation.
- 7 Bowman v. Breyfogle, 145 Ky. 443, 140 S.W. 694 (1911).
- 8 Hawkins v. Glenn, 131 U.S. 319, 9 S. Ct. 739, 33 L. Ed. 184 (1889); Shickle v. Watts, 94 Mo. 410, 7 S.W. 274 (1888) (overruled in part on other grounds by, Humphreys v. Atlantic Milling Co., 98 Mo. 542, 10 S.W. 140 (1888)).  
Generally, as to the liability of stockholders to creditors in respect of unpaid stock subscriptions, see Am. Jur. 2d, Corporations[WestlawNext®(r) Search Query].

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## 21 Am. Jur. 2d Creditors' Bills § 52

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill

#### E. Interests and Liabilities of Corporate Stockholders

## § 52. Dividends and other distributions to stockholders

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

Although prospective dividends on corporate stock may not, in view of the rule that a corporation does not become indebted for a dividend until it has been declared,<sup>1</sup> be reached by a creditor of the stockholder,<sup>2</sup> dividends which have been declared may be subject to a creditor's bill under statutes which make all choses in action subject to this remedy,<sup>3</sup> or under general principles which control this remedy in its application to choses in action.<sup>4</sup> A creditor's bill may also be invoked for the purpose of following assets distributed to stockholders by a corporation,<sup>5</sup> in accordance with the rule that creditors who hold unsatisfied claims against a corporation which has made a distribution to stockholders without leaving sufficient assets to cover its debts may follow the distributed assets into the hands of the stockholders.<sup>6</sup>

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### Footnotes

- 1 Am. Jur. 2d, Corporations[[WestlawNext®\(r\) Search Query](#)].
- 2 [Bowman v. Breyfogle](#), 145 Ky. 443, 140 S.W. 694 (1911).
- 3 § 46.
- 4 § 45.
- 5 [Pierce v. U.S.](#), 255 U.S. 398, 41 S. Ct. 365, 65 L. Ed. 697 (1921).
- 6 Am. Jur. 2d, Corporations[[WestlawNext®\(r\) Search Query](#)].

End of Document

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## 21 Am. Jur. 2d Creditors' Bills III F Refs.

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill

#### F. Interests Under Insurance Policies

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### A.L.R. Library

A.L.R. Index, Creditors' Bills

West's A.L.R. Digest, Debtor and Creditor 11

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## 21 Am. Jur. 2d Creditors' Bills § 53

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### III. Property Subject to Bill

#### F. Interests Under Insurance Policies

## § 53. Life insurance

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

An interest in life insurance may be effectively protected against creditors by exemption statutes, and these must, of course, be given effect in a creditor's suit.<sup>1</sup> In the case of an interest that may be subject to being taken under legal process, the interest is not subject to a creditor's bill in equity, since the legal remedy is adequate.<sup>2</sup> Supplementary proceedings may also be available for the reaching of such interest.<sup>3</sup>

Where the above considerations do not preclude resort to a creditor's bill, it is said that the interest of an insured in a life insurance policy is a property right which can ordinarily be reached by a creditor.<sup>4</sup> It has, however, generally been found that where an insured under a life insurance policy has not exercised his or her option to surrender the policy for its cash value, the insured's optional right to obtain the surrender value does not constitute a debt due the insured by the insurer, and a court of equity will not compel the insured to exercise such option and surrender the policy for the benefit of his or her creditor.<sup>5</sup> The rule is the same notwithstanding that the power to change beneficiaries is reserved.<sup>6</sup> Even where a policy is payable to the insured's executors, administrators, and assigns, the cash surrender value does not represent a debt due the insured by the insurer which may be reached by a creditor's bill until the insured has taken the steps requisite to a withdrawal in cash of such value.<sup>7</sup> There is, however, a distinction in these respects between the cash surrender value which the insured receives as an incident of the surrender or cancellation of the policy and the amount which, in case of policies with endowment features, becomes payable to the insured during his or her lifetime; the latter represents the proceeds of an investment rather than insurance, and the interest of the insured under a policy containing this investment feature is property subject to a creditor's bill.<sup>8</sup>

A creditor's bill is also effective in a proper case to reach the proceeds of insurance payable on the death of the insured,<sup>9</sup> as where it is determined that the payment of premiums by the insured constituted gifts which, in justice to creditors, he or she could not make.<sup>10</sup> However, a creditor's bill will not lie to recover from the proceeds of a policy paid on the death of the insured

judgment debtor the amount paid as premiums by the debtor where the insurance was taken out by the debtor for the benefit of his or her spouse and children, and the amount of the premiums was moderate in comparison with the debtor's earnings, and no fraud was involved.<sup>11</sup>

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Footnotes

- 1 Am. Jur. 2d, Exemptions[[WestlawNext®\(r\) Search Query](#)].
- 2 §§ 3, 25.
- 3 § 6.
- 4 *Kothe v. Phoenix Mut. Life Ins. Co.*, 269 Mass. 148, 168 N.E. 737 (1929).
- 5 *Fidelity Coal Co. v. Diamond*, 322 Ill. App. 229, 54 N.E.2d 240 (1st Dist. 1944); *Rosenthal v. Maletz*, 322 Mass. 586, 78 N.E.2d 652, 1 A.L.R.2d 1022 (1948).
- 6 *National Bank of Commerce v. Appel Clothing Co.*, 35 Colo. 149, 83 P. 965 (1905).
- 7 *Farmers' & Merchants' Bank v. National Life Ins. Co.*, 161 Ga. 793, 131 S.E. 902, 44 A.L.R. 1184 (1926).
- 8 *Biggert v. Straub*, 193 Mass. 77, 78 N.E. 770 (1906).
- 9 *Tompkins v. Levy*, 87 Ala. 263, 6 So. 346 (1889).
- 10 *Merchants' & Miners' Transp. Co. v. Borland*, 53 N.J. Eq. 282, 31 A. 272 (Ch. 1895).
- 11 *Central Nat. Bank v. Hume*, 128 U.S. 195, 9 S. Ct. 41, 32 L. Ed. 370 (1888).

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 54

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.


### III. Property Subject to Bill

#### F. Interests Under Insurance Policies

## § 54. Property and liability insurance

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

A creditor's bill may be used to reach property insurance proceeds when the property insured has been destroyed.<sup>1</sup> Under a statute permitting suits in equity by creditors to reach interests which cannot be attached or reached on execution, the interest of a debtor in the proceeds of a loss under a fire insurance policy can be reached even though the insurer has an unexercised option to pay the loss or rebuild.<sup>2</sup>

It would appear that one who obtains judgment against an insured under a liability insurance policy can proceed against the insurer to apply the insurance money to satisfaction of the judgment,<sup>3</sup> and this right, or the right to proceed in the same action, against both the insured and his or her liability insurer, is generally granted by statute or the liability insurance policy.<sup>4</sup> However, before the determination of the liability of an insured under an automobile liability policy, the insurer is subject to no chose in action and has no property of any sort belonging to a person injured by the automobile which can be reached by a judgment creditor of the latter by a creditor's bill.<sup>5</sup>

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### Footnotes

- 1 [Federal Deposit Ins. Corp. v. Willoughby](#), 19 Ohio App. 3d 51, 482 N.E.2d 1267 (8th Dist. Cuyahoga County 1984).
- 2 [Lewenstein v. Forman](#), 223 Mass. 325, 111 N.E. 962 (1916).
- 3 [Boston Ins. Co. v. Rash](#), 263 Ala. 201, 82 So. 2d 177 (1955).
- 4 As to statutory and policy provisions, generally, see Am. Jur. 2d, Automobile Insurance[[WestlawNext®\(r\) Search Query](#)]; Am. Jur. 2d, Insurance[[WestlawNext®\(r\) Search Query](#)].



5                      [Alms & Doepke Co. v. Johnson](#), 98 Ohio App. 78, 57 Ohio Op. 177, 128 N.E.2d 250, 51 A.L.R.2d 588 (1st Dist. Hamilton County 1954).

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills IV A Refs.

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

#### IV. Practice and Procedure

##### A. In General

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### A.L.R. Library

A.L.R. Index, Creditors' Bills

West's A.L.R. Digest, Debtor and Creditor 11

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## 21 Am. Jur. 2d Creditors' Bills § 55

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.


#### IV. Practice and Procedure

##### A. In General

## § 55. Practice and procedure generally; jurisdiction and venue

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

The practice and procedure in creditors' bills depend to a great extent upon the statutes and common law of the particular jurisdiction involved having to do with practice and procedure in civil actions and proceedings generally.<sup>1</sup> A judgment creditor's bill to reach property of his or her debtor is an independent and separate proceeding which may be instituted in any court having jurisdiction to entertain it, whether or not it is the same court that entered the original judgment.<sup>2</sup>

Since a creditor's bill is basically an in rem proceeding,<sup>3</sup> jurisdiction may be obtained over nonresidents to the extent essential for the relief generally granted in a creditor's bill—namely, the appropriation of the defendant's property to the payment of the indebtedness due the plaintiff, through the seizure of such property within the territorial jurisdiction of the court and constructive service upon the nonresident.<sup>4</sup> On such service the court has jurisdiction to ascertain the amount of the debt and to cause the same to be satisfied out of property in the state which the court has thereby drawn within its jurisdiction.<sup>5</sup> It has also been stated that service of summons on a nonresident defendant in the state of his or her residence under a statute authorizing such residence is sufficient to support any judgment except one in personam and dispenses with the necessity of constructive service.<sup>6</sup> Where the defendant does not have any property within the state, it is questionable whether the court should exercise jurisdiction in a creditor's bill action.<sup>7</sup>

With regard to the situs of a debt for jurisdictional purposes in a creditor's bill to reach a debt owing to a nonresident defendant, there is authority to the effect that debts owing to nonresidents, although represented by notes and mortgages, have their situs at the domicile of the debtor for the purpose of creditors' bills in favor of those to whom the creditor is indebted,<sup>8</sup> but there is also authority that the situs of the debt is at the domicile of the creditor, or, as otherwise stated, a debt has no situs and follows the person of the owner.<sup>9</sup>

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Footnotes

- 1 As to such matters, generally, see, Am. Jur. 2d, Actions[\[WestlawNext®\(r\) Search Query\]](#); Am. Jur. 2d, Appellate Review[\[WestlawNext®\(r\) Search Query\]](#); Am. Jur. 2d, Equity[\[WestlawNext®\(r\) Search Query\]](#); Am. Jur. 2d, Evidence[\[WestlawNext®\(r\) Search Query\]](#); Am. Jur. 2d, Parties[\[WestlawNext®\(r\) Search Query\]](#); Am. Jur. 2d, Pleading[\[WestlawNext®\(r\) Search Query\]](#); Am. Jur. 2d, Trial[\[WestlawNext®\(r\) Search Query\]](#); Am. Jur. 2d, Venue[\[WestlawNext®\(r\) Search Query\]](#).
- 2 *McElfresh v. McElfresh*, 8 Ohio L. Abs. 254, 1929 WL 2317 (Ct. App. 2d Dist. Montgomery County 1929). A creditor's bill may be brought as a separate lawsuit. *Fleming Companies, Inc. v. Rich*, 978 F. Supp. 1281 (E.D. Mo. 1997).
- 3 § 2.
- 4 *Shuck v. Quackenbush*, 75 Colo. 592, 227 P. 1041, 38 A.L.R. 259 (1924).
- 5 *Shuck v. Quackenbush*, 75 Colo. 592, 227 P. 1041, 38 A.L.R. 259 (1924).
- 6 *Miller v. Maryland Casualty Co.*, 207 Ark. 312, 180 S.W.2d 581 (1944).
- 7 *North Pacific S. S. Co. v. Guarisco*, 293 Or. 341, 647 P.2d 920 (1982).
- 8 *Bragg v. Gaynor*, 85 Wis. 468, 55 N.W. 919 (1893).
- 9 *Holbrook v. Ford*, 153 Ill. 633, 39 N.E. 1091 (1894).

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 56

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

#### IV. Practice and Procedure

##### A. In General

## § 56. Practice and procedure generally; jurisdiction and venue—Jurisdictional amount

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

Where suit is brought by creditors for distribution of a fund, in the nature of a trust fund, the amount of their joint claims or of the fund to be distributed is the test of jurisdiction.<sup>1</sup> Where, however, the claims of the creditors uniting in a creditor's bill are separate and independent of each other, are founded upon different contracts, upon judgments obtained at different times, and the allowance or rejection of one in no manner affects the others, each separate claim furnishes the jurisdictional test, and if none of the claims confer jurisdiction, the bill will be dismissed.<sup>2</sup> On the other hand, if one of the claims united in a creditor's bill exceeds the jurisdictional amount, jurisdiction is not lost because one of the claims joined is less than the jurisdictional amount.<sup>3</sup> Moreover, a creditor holding a claim less than the jurisdictional amount is permitted to intervene in a creditor's suit involving the requisite amount.<sup>4</sup>

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#### Footnotes

- 1 [Handley v. Stutz](#), 137 U.S. 366, 11 S. Ct. 117, 34 L. Ed. 706 (1890).
- 2 [Umbarger v. Watts](#), 66 Va. 167, 25 Gratt. 167, 1874 WL 5613 (1874).
- 3 [Huff v. Bidwell](#), 151 F. 563 (C.C.A. 5th Cir. 1907).
- 4 [Huff v. Bidwell](#), 151 F. 563 (C.C.A. 5th Cir. 1907).

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 57

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

#### IV. Practice and Procedure

##### A. In General

## § 57. Limitation of actions; laches

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### Forms

Am. Jur. Pleading and Practice Forms, Creditors' Bills—Forms Regarding Defenses and Equitable Relief [[WestlawNext®\(r\)](#)  
[Search Query](#)]

Whether a creditor's bill may be barred by a statute of limitations depends generally upon the provisions and effect, in the particular jurisdiction, of statutes of limitation.<sup>1</sup> Some jurisdictions apply the statute of limitations applicable to execution on a judgment,<sup>2</sup> or for a garnishment proceeding<sup>3</sup> to a creditor's bill. In any event, it appears that a cause of action to reach an equitable interest for the purpose of satisfying a judgment does not accrue until the return of execution unsatisfied, and is not barred until the statutory period of limitations has run following such return.<sup>4</sup>

That the statute of limitations has run against the claim of the creditor is, of course, a defense which may, in a proper case, be interposed by the defendant.<sup>5</sup> Moreover, there is some authority to the effect that an original complainant in a suit in the nature of a creditor's bill may rely upon the statute of limitations in opposition to the claims of other creditors who have come in since the institution of the suit.<sup>6</sup>

The equitable doctrine of laches applies to creditors' suits in the same way as it applies to other actions of an equitable nature.<sup>7</sup> Accordingly, lapse of time and change of position as a result thereof may preclude creditors from invoking the equitable remedies

of the court for the enforcement of their rights, which, if freshly pursued, would be available.<sup>8</sup> However, laches may not be a defense where continuing fraud is involved.<sup>9</sup>

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#### Footnotes

- 1 As to the effect of the dormancy of a judgment on the creditor's right to bring an equitable on, see § 12.
- 2 *Giove v. Stanko*, 49 F.3d 1338 (8th Cir. 1995) (applying Nebraska law); *First Nat. Bank in Mitchell v. Daggett*, 242 Neb. 734, 497 N.W.2d 358 (1993).
- 3 *Shockley v. Harry Sander Realty Co., Inc.*, 771 S.W.2d 922 (Mo. Ct. App. E.D. 1989) (10 years).
- 4 *Taylor v. Bowker*, 111 U.S. 110, 4 S. Ct. 397, 28 L. Ed. 368 (1884).
- 5 *Strike v. McDonald*, 2 H. & G. 191, 1828 WL 629 (Md. 1828).
- 6 *Strike v. McDonald*, 2 H. & G. 191, 1828 WL 629 (Md. 1828).
- 7 As to the doctrine of laches in equity, generally, see Am. Jur. 2d, Equity[WestlawNext®(r) Search Query].
- 8 *Donovan v. Armour & Co.*, 160 Fla. 62, 33 So. 2d 601 (1948).
- 9 *Robinson v. Springfield Co.*, 21 Fla. 203, 1885 WL 1761 (1885).

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 58

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

#### IV. Practice and Procedure

##### A. In General

## § 58. Abatement or survival

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

According to some authorities, the death of the debtor extinguishes the right of the creditor to prosecute a pending creditor's bill, when no lien exists,<sup>1</sup> but in those jurisdictions where the plaintiff in a creditor's action acquires, by the commencement of the suit, a lien upon the choses in action and equitable assets of the debtor, it has been stated that this lien is not displaced or defeated by the death of the debtor before judgment.<sup>2</sup>

It is commonly held that a creditor's bill filed by one creditor on behalf of him- or herself and all other creditors who may join therein does not generally preclude another creditor, not a party to the first bill, from proceeding by an original creditor's bill.<sup>3</sup>

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#### Footnotes

<sup>1</sup> [Saginaw County Sav. Bank v. Duffield](#), 157 Mich. 522, 122 N.W. 186 (1909); [Newman v. Haggard](#), 167 Tenn. 542, 72 S.W.2d 549 (1934).

<sup>2</sup> § 81.

<sup>3</sup> Am. Jur. 2d, Abatement, Survival and Revival[[WestlawNext®\(r\) Search Query](#)].

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 59

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.


#### IV. Practice and Procedure

##### A. In General

## § 59. Conduct and dismissal of suit

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

Proceedings on a creditor's bill involve a full trial complete with responsive pleadings and discovery.<sup>1</sup> The general rule that the plaintiff in an action has the power to control the prosecution thereof, at least until an application has been made to intervene, applies ordinarily to a creditor's bill brought by a creditor for the benefit of him- or herself and other creditors, and such a suit is under the control of the plaintiff up to the time a decree is rendered therein if no application is made by another creditor to intervene.<sup>2</sup> However, after an order or decree has been made in the suit,<sup>3</sup> or after other creditors have been made parties plaintiff, the original plaintiff does not, as a rule, have the same right to control the suit as he or she previously enjoyed; the original plaintiff is not permitted to jeopardize the interest of other creditors through his or her neglect of the case, and control of the suit may be taken from him or her and given to another person.<sup>4</sup>

Ordinarily, one who brings suit against the debtor, for him- or herself and other creditors, has the right to dismiss the suit before others interested have taken steps to become parties and before the court has made any order or decree affecting their rights.<sup>5</sup> On the other hand, the plaintiff is not permitted to dismiss the suit after other creditors have intervened or been brought into the case as plaintiffs<sup>6</sup> or after a decree or order, such as one granting an injunction or appointing a receiver or referee, made for the benefit of interested persons other than the plaintiff, has been rendered if they object to such action on his part.<sup>7</sup>

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#### Footnotes

- <sup>1</sup> [Equisearch, Inc. v. Lopez](#), 722 P.2d 426 (Colo. App. 1986).
- <sup>2</sup> [Hallett v. Moore](#), 282 Mass. 380, 185 N.E. 474, 91 A.L.R. 572 (1933).
- <sup>3</sup> [Catron v. Bostic](#), 123 Va. 355, 96 S.E. 845 (1918).

- 4                   Manning v. Mercantile Trust Co., 37 Misc. 215, 75 N.Y.S. 168 (Sup 1902).  
5                   Hirshfeld v. Fitzgerald, 157 N.Y. 166, 51 N.E. 997 (1898).  
6                   La Tourette v. Fletcher, 6 App. D.C. 324, 1895 WL 11753 (App. D.C. 1895).  
7                   Belmont Nail Co v. Columbia Iron & Steel Co, 46 F. 336 (C.C.W.D. Pa. 1891).

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills IV B Refs.

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### IV. Practice and Procedure

#### B. Parties

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### A.L.R. Library

A.L.R. Index, Creditors' Bills

West's A.L.R. Digest, Debtor and Creditor 11

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## 21 Am. Jur. 2d Creditors' Bills § 60

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

#### IV. Practice and Procedure

##### B. Parties

## § 60. Parties plaintiff

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

As a general rule, a creditor may file and maintain a creditor's bill for his or her own interest without reference to other creditors.<sup>1</sup> Other judgment creditors who have not filed such a bill, or acquired a lien otherwise on the assets which the plaintiff seeks to have applied to the payment of his judgment, are not necessary parties, at least where their presence is not necessary for the protection of the defendant.<sup>2</sup> However, in certain situations, as, for example, where property is deemed to be held in trust for creditors, a bill must be filed in behalf of creditors generally and not merely in the interest of a particular creditor.<sup>3</sup>

Pursuant to traditional equity practice, a creditor's bill generally can be brought only by a creditor who has already obtained a judgment establishing the debt.<sup>4</sup>

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#### Footnotes

- 1 [Commissioners Freedman's Savings & Trust Co. v. Earle](#), 110 U.S. 710, 4 S. Ct. 226, 28 L. Ed. 301 (1884); [Hall v. Henderson](#), 114 Ala. 601, 21 So. 1020 (1897).
- 2 [Seymour v. McAvoy](#), 121 Cal. 438, 53 P. 946 (1898).
- 3 [Arnold v. Hagerman](#), 45 N.J. Eq. 186, 17 A. 93 (Ct. Err. & App. 1889).
- 4 [Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.](#), 527 U.S. 308, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999).

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 61

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.


#### IV. Practice and Procedure

##### B. Parties

### § 61. Parties plaintiff—Joinder; class suits

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

Although, as a general rule, a creditor may maintain a creditor's bill for his or her own interest, and other judgment creditors who have not filed such a bill or acquired a lien otherwise on the assets sought to be seized are not necessary parties thereto, creditors by several judgments are permitted to join as complainants in a creditor's bill against the same debtor where they have a common interest in obtaining the relief sought.<sup>1</sup> In some jurisdictions each creditor joined as a plaintiff must have secured a judgment against the defendant upon which execution has been issued and returned unsatisfied.<sup>2</sup> However, it is sometimes stated that where there are several creditors and the remedies at law have been exhausted as to one, relief may be granted as to all.<sup>3</sup>

To avoid inconvenience from joining a great number of individuals as plaintiffs in the one case and to avoid a multiplicity of suits in the other, courts of equity will allow one creditor to file a bill for him- or herself and all others standing in the same situation, as judgment creditors whose executions have been returned unsatisfied and who may choose to come in under the decree and contribute to the expenses of the suit.<sup>4</sup> In some situations, moreover, a creditor has been required to file his or her bill on behalf of all creditors in order to maintain it successfully.<sup>5</sup>

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#### Footnotes

<sup>1</sup> [Ratliff v. Nowery](#), 102 Fla. 1072, 136 So. 895 (1931); [Roy Mitchell Contracting Co. v. Mueller Co.](#), 326 S.W.2d 522 (Tex. Civ. App. Texarkana 1959), writ refused n.r.e., (Nov. 4, 1959).

As to the right of a creditor to control or dismiss a suit brought on behalf of both himself and other creditors, see § 59.

<sup>2</sup> § 24.

<sup>3</sup> § 24.

4                      Seaver v. Bigelows, 72 U.S. 208, 18 L. Ed. 595, 1866 WL 9398 (1866); Auburn Automobile Co. v. Namor  
                         Corp., 106 Fla. 594, 143 So. 604 (1932).  
5                      § 60.

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 62

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

#### IV. Practice and Procedure

##### B. Parties

## § 62. Parties defendant

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

The plaintiff or judgment creditor bringing a creditor's bill is required to file a complaint against and serve as a party defendant the person alleged to be holding the property of the judgment debtor or alleged to be indebted to the judgment debtor.<sup>1</sup> The judgment debtor is also ordinarily a necessary party defendant to a creditor's bill.<sup>2</sup>

In general, the plaintiff may join as defendants all persons whose rights may properly be ascertained and adjusted with a view to the proper application of the proceeds of the property sought to be reached.<sup>3</sup> Necessary parties defendant should be joined,<sup>4</sup> but those whose interests are fully represented by parties before the court,<sup>5</sup> or whose interests in the subject matter of the bill cannot be affected in the creditor's proceeding,<sup>6</sup> are not necessary parties. Nor are other judgment creditors who have not filed a creditor's bill or acquired a lien otherwise on the assets sought to be seized necessary parties.<sup>7</sup>

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#### Footnotes

- <sup>1</sup> [In re Osgood](#), 203 B.R. 865 (Bankr. D. Mass. 1997) (statutory action analogous to creditor's bill); [Powell v. Grewing](#), 562 N.W.2d 761 (Iowa 1997).
- <sup>2</sup> [Gaylords v. Kelshaw](#), 68 U.S. 81, 17 L. Ed. 612, 1863 WL 6637 (1863); [In re Osgood](#), 203 B.R. 865 (Bankr. D. Mass. 1997) (statutory action analogous to creditor's bill).
- <sup>3</sup> [Bragg v. Gaynor](#), 85 Wis. 468, 55 N.W. 919 (1893).
- <sup>4</sup> [Goodman v. Niblack](#), 102 U.S. 556, 26 L. Ed. 229, 1880 WL 18898 (1880) (assignees are necessary parties to a bill by a creditor to reach a fund arising from the claims included in an assignment for the benefit of creditors).
- <sup>5</sup> [Chicago, R.I. & P.R. Co. v. Howard](#), 74 U.S. 392, 19 L. Ed. 117, 1868 WL 11086 (1868).

6 Ogilvie v. Knox Ins. Co., 63 U.S. 380, 22 How. 380, 16 L. Ed. 349, 1859 WL 10649 (1859); McColcan v.  
Walter Magee, 172 Cal. 182, 155 P. 995 (1916).  
7 § 60.

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 63

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

#### IV. Practice and Procedure

##### B. Parties

## § 63. Intervention

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

In accordance with the general principles concerning intervention in civil actions,<sup>1</sup> judgment creditors, on proper application, are ordinarily permitted to come in and make themselves parties to a creditor's bill, and need not resort to independent proceedings.<sup>2</sup> Some courts have held, moreover, that this right is not confined to creditors whose claims have been reduced to judgment.<sup>3</sup> Other courts, however, have denied to simple contract creditors the right to intervene,<sup>4</sup> at least where the case is one in which the creditors are required to have exhausted their legal remedies against the debtor.<sup>5</sup>

One who intervenes in a creditor's suit ordinarily must come into the case as it exists and conform to the pleadings as he or her finds them.<sup>6</sup> He or she is not ordinarily permitted to raise issues whose disposition will interfere with a prompt determination of the original plaintiff's case.<sup>7</sup> In some cases, however, the court may allow intervention for the assertion of a claim that is hostile to the plaintiff's claim; for instance, where property sought by a creditor's suit is a concealed asset of a third person rather than of the debtor, intervention is proper to allow the independent claim of the true owner to the property.<sup>8</sup> In addition, a creditor may intervene to assert a priority in the debtor's assets.<sup>9</sup>

Intervention, when proper, is allowed at almost any stage of the proceedings and, in special circumstances, even after decree, if the applicants can show an interest in the common fund.<sup>10</sup>

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#### Footnotes

<sup>1</sup> Am. Jur. 2d, Parties[[WestlawNext®\(r\) Search Query](#)].

2                   Stewart v. Dunham, 115 U.S. 61, 5 S. Ct. 1163, 29 L. Ed. 329 (1885); Johnson v. Waters, 111 U.S. 640, 4 S.  
3                   Ct. 619, 28 L. Ed. 547 (1884); Myers v. Fenn, 72 U.S. 205, 18 L. Ed. 604, 1866 WL 9391 (1866).  
4                   Merchants' Nat. Bank v. McDonald, 63 Neb. 363, 88 N.W. 492 (1901); Fuqua v. Trego, 1943-NMSC-004,  
5                   47 N.M. 34, 133 P.2d 344 (1943).  
6                   Horn v. Volcano Water Co., 13 Cal. 62, 1859 WL 951 (1859).  
7                   §§ 4 to 24.  
8                   Booth v. State, 131 Ga. 750, 63 S.E. 502 (1908); Hallett v. Moore, 282 Mass. 380, 185 N.E. 474, 91 A.L.R.  
9                   572 (1933).  
10                  Hallett v. Moore, 282 Mass. 380, 185 N.E. 474, 91 A.L.R. 572 (1933).  
                  Little v. Saffer, 110 Fla. 230, 148 So. 573 (1933).  
                  Eldridge v. Post, 20 Fla. 579, 1884 WL 2080 (1884).  
                  Seaver v. Bigelows, 72 U.S. 208, 18 L. Ed. 595, 1866 WL 9398 (1866).

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills IV C Refs.

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### IV. Practice and Procedure

#### C. Pleading

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### A.L.R. Library

A.L.R. Index, Creditors' Bills

West's A.L.R. Digest, Debtor and Creditor 11

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 64

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.


#### IV. Practice and Procedure

##### C. Pleading

## § 64. Bill or complaint, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### Forms

Am. Jur. Pleading and Practice Forms, Creditors' Bills—Forms Regarding Complaints and Petitions [[WestlawNext®\(r\)](#)  
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In accordance with the general principles of pleading, the plaintiff in a creditor's bill should allege clearly and definitely every fact that is necessary to entitle him or her to relief.<sup>1</sup> If the complainant intends to establish his or her case by showing fraud, a specific statement thereof should be made; a mere general statement of fraud is not sufficient.<sup>2</sup> A mere general allegation that there is no remedy at law or no adequate remedy at law is insufficient.<sup>3</sup> However, it is unnecessary for judgment creditors to allege that they had no adequate remedy at law where facts were alleged from which the court could draw the conclusion that there was no adequate remedy at law.<sup>4</sup> On the other hand, if the bill or complaint discloses the existence of an adequate remedy at law, it will be dismissed on demurrer.<sup>5</sup>

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### Footnotes

- <sup>1</sup> [Miller v. Security-Peoples Trust Co.](#), 142 Fla. 434, 195 So. 191, 129 A.L.R. 500 (1940).  
<sup>2</sup> [Morgan Bros. v. Dayton Coal & Iron Co.](#), 134 Tenn. 228, 183 S.W. 1019 (1916).

As to the provisions of the Federal Rules of Civil Procedure requiring that in all averments of fraud the circumstances of the fraud must be stated with particularity, see Am. Jur. 2d, Fraud and Deceit[[WestlawNext®\(r\) Search Query](#)].

3                    [Miller v. Security-Peoples Trust Co.](#), 142 Fla. 434, 195 So. 191, 129 A.L.R. 500 (1940); [Stewart v. Manget](#),  
132 Fla. 498, 181 So. 370 (1938).

4                    [Blattel v. Stallings](#), 346 Mo. 450, 142 S.W.2d 9 (1940).

5                    [Herrlich v. Kaufmann](#), 99 Cal. 271, 33 P. 857 (1893).

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 65

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

#### IV. Practice and Procedure

##### C. Pleading

## § 65. Allegation of judgment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### Forms

Am. Jur. Pleading and Practice Forms, Creditors' Bills—Forms Regarding Complaints and Petitions [\[WestlawNext®\(r\) Search Query\]](#)

Since the general rule is that a creditor must obtain a judgment establishing the measure and validity of his demand before he can maintain a creditor's bill,<sup>1</sup> the bill must ordinarily set forth a judgment rendered in a court of the state in which the suit is brought,<sup>2</sup> or a federal court judgment,<sup>3</sup> or make allegations showing that it is impossible to obtain such a judgment in any court within the state.<sup>4</sup> A mere allegation by a creditor that the validity of his or her claim is undisputed does not amount to an affirmative allegation that the validity and amount of his or her claim has been acknowledged or admitted by the debtor so as to bring the creditor within the rule that it is unnecessary to obtain a judgment at law under circumstances where the claim is admitted.<sup>5</sup> However, where, by statute, a creditor's bill may be commenced in equity before a judgment at law has been granted,<sup>6</sup> the plaintiff need only allege sufficient facts to show that there has been a commencement of a suit at law.<sup>7</sup>

### Practice Tip:

Since the judgment against a debtor establishes his or her liability to pay the debt, the bill need not allege the indebtedness upon which the judgment therein set out was recovered.<sup>8</sup>

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#### Footnotes

- 1 § 8.
- 2 National Tube Works Co. v. Ballou, 146 U.S. 517, 13 S. Ct. 165, 36 L. Ed. 1070 (1892); Foster v. Evans, 384 Mass. 687, 429 N.E.2d 995 (1981).
- 3 § 14.
- 4 National Tube Works Co. v. Ballou, 146 U.S. 517, 13 S. Ct. 165, 36 L. Ed. 1070 (1892); Miller v. Maryland Casualty Co., 207 Ark. 312, 180 S.W.2d 581 (1944).
- 5 Buckley v. Maupin, 344 Mo. 193, 125 S.W.2d 820 (1939).
- 6 § 9.
- 7 Davis v. Turner, 147 So. 224 (Fla. 1932).
- 8 Tatum v. Rosenthal, 95 Cal. 129, 30 P. 136 (1892).

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 66

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

#### IV. Practice and Procedure

##### C. Pleading

## § 66. Allegation of exhaustion of remedies at law

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### Forms

Am. Jur. Pleading and Practice Forms, Creditors' Bills—Forms Regarding Complaints and Petitions [[WestlawNext®\(r\)](#)  
[Search Query](#)]

Where the general rule that the plaintiff in a creditor's action must exhaust his or her legal remedies before he or she is entitled to maintain an equitable action applies,<sup>1</sup> the bill or complaint should aver, where an attempt is made by a process in equity to reach equitable interests, choses in action, or the avails of property fraudulently conveyed, that judgment has been obtained and that execution has been issued and that it has been returned by an officer without satisfaction,<sup>2</sup> or such facts must be set out as will excuse a failure in this regard.<sup>3</sup> Where a creditor's bill is based on a judgment obtained in the state but predicated on a judgment rendered in another state, it need not, in addition to alleging that all legal means of satisfying the domestic judgment have proved unavailing, also allege that all means of satisfying the judgment of the other state have proved unavailing.<sup>4</sup>

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### Footnotes

<sup>1</sup> §§ 4 to 24.



- 2                    Taylor v. Bowker, 111 U.S. 110, 4 S. Ct. 397, 28 L. Ed. 368 (1884); Case v. Beauregard, 101 U.S. 688, 25 L. Ed. 1004, 1879 WL 16717 (1879); Foster v. Evans, 384 Mass. 687, 429 N.E.2d 995 (1981).  
The complainant must aver generally that the judgment debtor does not have sufficient personal or real property subject to levy on execution to satisfy the judgment. [Graybar Elec. Co. v. Keller Elec. Co.](#), 113 Ohio App. 3d 172, 680 N.E.2d 687 (9th Dist. Summit County 1996).
- 3                    Case v. Beauregard, 101 U.S. 688, 25 L. Ed. 1004, 1879 WL 16717 (1879); Spencer v. Anderson, 193 Cal. 1, 222 P. 355, 35 A.L.R. 822 (1924).
- 4                    Generally, as to what circumstances will excuse exhaustion of legal remedies, see §§ 19 to 24.  
[Miller v. Security-Peoples Trust Co.](#), 142 Fla. 434, 195 So. 191, 129 A.L.R. 500 (1940).

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 67

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.


#### IV. Practice and Procedure

##### C. Pleading

### § 67. Description of property to be reached

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

#### Forms

Am. Jur. Pleading and Practice Forms, Creditors' Bills—Forms Regarding Complaints and Petitions [[WestlawNext®\(r\)](#)  
[Search Query](#)]

The property to be reached by a creditor's bill must be described with certainty,<sup>1</sup> except that where the character of the property is unknown, the creditor's bill should seek a discovery, alleging the existence of the property and the fact that its nature and character or location are unknown and concealed.<sup>2</sup> It has also been found that a judgment creditor may demand from his or her debtor a disclosure of the debtor's assets, and the names of his or her debtors, in general terms.<sup>3</sup>

If the petition for a creditor's bill is legally deficient because it fails to allege an interest in property which can lawfully be reached by a creditor's bill, it necessarily follows that no lien can arise from its filing.<sup>4</sup>

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#### Footnotes

- 1 [Riesen v. Maryland Casualty Co.](#), 153 Fla. 205, 14 So. 2d 197 (1943); [George E. Sebring Co. v. O'Rourke](#), 101 Fla. 885, 134 So. 556 (1931).

- 2                   Davenport & Harris Funeral Homes v. Kennedy, 243 Ala. 613, 11 So. 2d 379 (1943).  
3                   Bay State Iron Co. v. Goodall, 39 N.H. 223, 1859 WL 3791 (1859).  
4                   Doksansky v. Norwest Bank Nebraska, N.A., 260 Neb. 100, 615 N.W.2d 104 (2000).

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 68

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

#### IV. Practice and Procedure

##### C. Pleading

## § 68. Answer

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### Forms

Am. Jur. Pleading and Practice Forms, Creditors' Bills—Forms Regarding Defenses and Equitable Relief [[WestlawNext®\(r\) Search Query](#)]

Am. Jur. Pleading and Practice Forms, Creditors' Bills—Forms Regarding Complaints and Petitions [[WestlawNext®\(r\) Search Query](#)]

Where the plaintiff alleges that the defendant has no property on which to levy, the proper manner in which to controvert such negative averment is to affirm that he or she has such property.<sup>1</sup> It is ordinarily a condition precedent to the filing of a creditor's bill that the complainant must have exhausted his or her remedies at law before coming into equity,<sup>2</sup> and it is therefore a sufficient answer to the bill that the debtor has property subject to execution from which the demand may be fully satisfied.<sup>3</sup> An objection that the demands of the complainant had not been reduced to judgment and execution before filing the bill has been held a defense personal to the defendant which may be waived by failure to interpose it at the proper time.<sup>4</sup>

A defendant alleged to be indebted to the judgment debtor may, in the judgment creditor's suit, interpose any defense he may have against the judgment debtor. Conversely, if the defense interposed would not be a good defense to an action instituted by the judgment debtor, it will not operate as a valid defense to a suit by the judgment creditor.<sup>5</sup>

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Footnotes

- 1 [Bomberger v. Turner](#), 13 Ohio St. 263, 1862 WL 15 (1862).
- 2 [§§ 4 to 24](#).
- 3 [Graybar Elec. Co. v. Keller Elec. Co.](#), 113 Ohio App. 3d 172, 680 N.E.2d 687 (9th Dist. Summit County 1996).
- 4 [Hollins v. Brierfield Coal & Iron Co.](#), 150 U.S. 371, 14 S. Ct. 127, 37 L. Ed. 1113 (1893); [Day v. Washburn](#), 65 U.S. 352, 24 How. 352, 16 L. Ed. 712, 1860 WL 9978 (1860); [Thomas v. Richards](#), 13 Ill. 2d 311, 148 N.E.2d 740 (1958).
- 5 [Spencer v. Anderson](#), 193 Cal. 1, 222 P. 355, 35 A.L.R. 822 (1924).  
Generally, as to the derivative nature of a judgment creditor's claim, see [§ 25](#).

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 69

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

#### IV. Practice and Procedure

##### C. Pleading

## § 69. Amendments; supplemental bills

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

A creditor's bill, if insufficient to sustain a creditor's suit, may be amended so as to make it sufficient.<sup>1</sup> Amendments in such cases are ordinarily allowed under the same circumstances and conditions as in other equity suits,<sup>2</sup> and the court may permit an amendment of a creditor's bill for the purpose of making it more certain and definite.<sup>3</sup> An amendment is not objectionable as adding a new and distinct cause of action where it is germane to the original cause of action and seeks to make a third person a party defendant in order to enable the court to grant complete relief with respect to the subject matter of the creditor's bill.<sup>4</sup> If, because of a statute providing that no relief in equity may be granted to the creditor of a beneficiary in respect to trust funds where the trust has been created by some person other than the debtor, a creditor's bill may not be maintained, it may be amended to an action at law.<sup>5</sup>

The function of a supplemental bill in equity is to support the cause of the suit existing when the original bill was filed; changes in circumstances, occurring after the filing of the original bill, may properly be brought before the court by amendment or by supplemental bill in the nature of an amendment.<sup>6</sup> After-acquired property of the principal defendant to a creditor's bill can be reached only by filing a supplemental bill.<sup>7</sup>

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#### Footnotes

- 1 [Hollingsworth v. Arcadia Citrus Growers Ass'n](#), 154 Fla. 399, 18 So. 2d 159 (1944).
- 2 [Hollingsworth v. Arcadia Citrus Growers Ass'n](#), 154 Fla. 399, 18 So. 2d 159 (1944).
- 3 [Leavitt v. Dimond](#), 227 Mass. 216, 116 N.E. 410 (1917); [Kinney v. Craig](#), 103 Va. 158, 48 S.E. 864 (1904).
- 4 [Harper v. Atlanta Mill. Co.](#), 203 Ga. 608, 48 S.E.2d 89 (1948).

- 5                      [Brahmey v. Rollins](#), 87 N.H. 290, 179 A. 186, 119 A.L.R. 8 (1935).  
6                      [Bethlehem Fabricators v. H.D. Watts Co.](#), 286 Mass. 556, 190 N.E. 828, 93 A.L.R. 1124 (1934).  
7                      [Newlove v. Pennock](#), 123 Mich. 260, 82 N.W. 54 (1900).

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills IV D Refs.

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### IV. Practice and Procedure

### D. Evidence

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### A.L.R. Library

A.L.R. Index, Creditors' Bills

West's A.L.R. Digest, Debtor and Creditor 11

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 70

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

#### IV. Practice and Procedure

##### D. Evidence

## § 70. Evidence generally; burden of proof

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

In a proceeding by a creditor's bill to subject to the payment of a debt property of the debtor not reachable on execution, the plaintiff must establish his or her case not only by his or her pleadings, but by proof.<sup>1</sup> A case must be made both in the bill or complaint<sup>2</sup> and by proof, which will entitle the creditor to subject the property of his or her debtor, not reachable on execution, to the payment of his or her debts.<sup>3</sup> In accord with the substantive rule which generally requires a creditor to exhaust his or her legal remedies before seeking the aid of equity through a creditor's bill,<sup>4</sup> he or she must ordinarily prove that a judgment has been recovered on his or her debt and execution returned unsatisfied<sup>5</sup> or that an execution would have been unavailing.<sup>6</sup> Further, the plaintiff has the burden of showing that the assets he or she seeks to subject to payment of his or her claim are the property of the debtor.<sup>7</sup> Where the judgment creditor is allowed to file an action without proof of return of execution unsatisfied by alleging that the judgment debtor has insufficient assets to satisfy the judgment, if the judgment debtor denies that he or she lacks sufficient assets, the burden is on the judgment creditor to offer evidence of such fact.<sup>8</sup>

The return upon execution that no property can be found establishes, prima facie at least, the exhaustion of legal remedies, and the burden is on the defendant to overcome the presumption by other evidence; some cases hold that the return is conclusive as to whether the creditor's remedy at law has proved effectual.<sup>9</sup> In addition, proof of the recovery of judgment is sufficient to cast the burden of proof of payment of the indebtedness covered thereby on the defendant.<sup>10</sup>

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#### Footnotes

<sup>1</sup> [National Bank of Commerce v. Appel Clothing Co.](#), 35 Colo. 149, 83 P. 965 (1905).

- 2 §§ 64 to 69.
- 3 National Bank of Commerce v. Appel Clothing Co., 35 Colo. 149, 83 P. 965 (1905).
- 4 § 4.
- 5 Jones v. Green, 68 U.S. 330, 17 L. Ed. 553, 1863 WL 6623 (1863).
- 6 O'Brien v. Stambach, 101 Iowa 40, 69 N.W. 1133 (1897).
- 7 Shedd v. Oliver, 144 Fla. 775, 198 So. 692 (1940); Publicity Bldg. Realty Corp. v. Thomann, 353 Mo. 493,  
183 S.W.2d 69 (1944).
- 8 Graybar Elec. Co. v. Keller Elec. Co., 113 Ohio App. 3d 172, 680 N.E.2d 687 (9th Dist. Summit County  
1996).
- 9 § 18.
- 10 O'Brien v. Stambach, 101 Iowa 40, 69 N.W. 1133 (1897).

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## 21 Am. Jur. 2d Creditors' Bills § 71

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.


#### IV. Practice and Procedure

#### D. Evidence

## § 71. Proof of solvency or insolvency

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

The opinions of witnesses as to the solvency or insolvency of a debtor are usually inadmissible in creditors' suits.<sup>1</sup> The insolvency of the debtor may be proved by showing that he is a nonresident and was known by neighbors to have had some exempt property but no property that could be reached by a creditor's bill.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [Brice v. Lide](#), 30 Ala. 647, 1857 WL 441 (1857); [Babcock v. Middlesex Sav. Bank & Bldg. Ass'n](#), 28 Conn. 302, 1859 WL 1276 (1859).

<sup>2</sup> As to what constitutes insolvency generally, see Am. Jur. 2d, Insolvency[[WestlawNext®\(r\) Search Query](#)].  
[Tittman v. Thornton](#), 107 Mo. 500, 17 S.W. 979 (1891).

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 72

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.


#### IV. Practice and Procedure

##### D. Evidence

## § 72. Weight and sufficiency

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

However sufficient the bill may be to entitle the complainant to relief, the decree based thereon, to be sustained, must be supported by the evidence,<sup>1</sup> and, moreover, such evidence must be clear, unequivocal, and decisive.<sup>2</sup> A suit will fail where the burden of proof of the issuance and return unsatisfied of an execution is required of the plaintiff,<sup>3</sup> and no proof of these facts is produced at the trial.<sup>4</sup> There is, moreover, authority to the effect that the absence of such proof on the part of a plaintiff is not remedied by the fact that his bill was consolidated with that of another creditor who furnished such proof in reference to his claim;<sup>5</sup> but in this respect it should be noted that some authority holds that where there are several creditors, and the claim of one has been reduced to judgment and the remedy at law exhausted, even a judgment is not required as a condition precedent to equitable relief on the claim of another creditor.<sup>6</sup>

The judgment upon which a creditor's suit is based is held to be conclusive evidence in such suit, as against other creditors of the defendant, of the plaintiff's status as a creditor and the amount of the indebtedness owing him or her, provided it is not impeached for fraud, collusion, or other cause rendering it void.<sup>7</sup> Even the judgment of a foreign court is some evidence of an indebtedness and should be given full faith and credit for this purpose.<sup>8</sup>

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#### Footnotes

- 1 [Morgan Bros. v. Dayton Coal & Iron Co.](#), 134 Tenn. 228, 183 S.W. 1019 (1916).
- 2 [Brazelton v. Lewis](#), 1943 OK 112, 192 Okla. 568, 137 P.2d 905 (1943).
- 3 [§ 70.](#)
- 4 [Jones v. Green](#), 68 U.S. 330, 17 L. Ed. 553, 1863 WL 6623 (1863).

5                    Russell v. Chicago Trust & Savings Bank, 139 Ill. 538, 29 N.E. 37 (1891).  
6                    § 24.  
7                    Candee v. Lord, 2 N.Y. 269, 1849 WL 5323 (1849).  
8                    Shuck v. Quackenbush, 75 Colo. 592, 227 P. 1041, 38 A.L.R. 259 (1924).

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## 21 Am. Jur. 2d Creditors' Bills IV E Refs.

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### IV. Practice and Procedure

### E. Judgment and Relief

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### A.L.R. Library

A.L.R. Index, Creditors' Bills

West's A.L.R. Digest, Debtor and Creditor 11

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## 21 Am. Jur. 2d Creditors' Bills § 73

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

#### IV. Practice and Procedure

##### E. Judgment and Relief

## § 73. Judgment and relief generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

Where the parties and subject matter are before the court in a creditor's suit, it will determine the validity of assignments and transfers by the debtor with the view of uncovering property that is capable of being levied on.<sup>1</sup> Where other creditors have come in after the filing of a bill in behalf of all creditors, the court will pass on the rights of all creditors before it.<sup>2</sup> The principle that equity will retain jurisdiction to award complete relief between the parties, however, is not carried to the extreme of awarding relief that is strictly legal in nature against a party who was joined as a defendant with the debtor but was obligated neither legally nor equitably to the plaintiff at the commencement of the action.<sup>3</sup> The court may, under circumstances requiring it, render a conditional decree.<sup>4</sup> Where it appears from the evidence in a creditor's suit that the creditor possesses collateral security for a portion of his or her debt, the court may require the creditor to exhaust such security before subjecting the other property of the debtor.<sup>5</sup> Where a judgment creditor brings an action in the nature of a creditor's bill to enforce collection of a judgment, and the defendant during the pendency of the action, by unconditional purchase in good faith, becomes the absolute and beneficial owner of an existing judgment against the plaintiff and seeks by appropriate procedure to have such judgment set off against the plaintiff's judgment, the court, in the exercise of a sound discretion based upon principles of equity, may allow the setoff.<sup>6</sup> However, the court has no authority to order a judgment debtor to make payments in installments out of income he or she receives, unless the judgment debtor so moves.<sup>7</sup>

As is the rule generally,<sup>8</sup> persons not parties or privies are not bound by the judgment in a creditor's suit, although parties and privies are bound. Persons recording a preexisting deed after the filing of a lis pendens in the creditor's suit affecting title to the property are purchasers pendente lite, so as to be bound by the judgment, where a deed takes effect as against subsequent encumbrances only from the time of record.<sup>9</sup>

Footnotes

- 1 [Shipley v. Browning](#), 114 W. Va. 409, 172 S.E. 149, 91 A.L.R. 643 (1933).
- 2 [Stewart v. Dunham](#), 115 U.S. 61, 5 S. Ct. 1163, 29 L. Ed. 329 (1885).  
Individual creditors, as a matter of judicial efficiency and fairness to all parties, would not be allowed to bring individual actions or proceedings against a foreign reinsurance company in courts throughout the United States pursuant to a court sanctioned scheme of arrangement between the company and its creditors under the law of Bermuda; although there was an arbitration agreement between the company and the creditor and United States policy favored arbitration agreements, according comity to the Bermuda injunction was consistent with, and certainly would not violate, United States public policy. [In re Petition of Bd. of Directors of Hopewell Intern. Insurance Ltd.](#), 275 B.R. 699 (S.D. N.Y. 2002).
- 3 [Smith v. Bourbon County](#), 127 U.S. 105, 8 S. Ct. 1043, 32 L. Ed. 73 (1888).
- 4 [McEntire v. McEntire](#), 107 Ohio St. 510, 1 Ohio L. Abs. 405, 140 N.E. 328 (1923).
- 5 [Barret v. Reed](#), Wright 700 (Ohio 1834).
- 6 [Montalto v. Yeckley](#), 143 Ohio St. 181, 28 Ohio Op. 107, 54 N.E.2d 421 (1944).
- 7 [Kuykendall v. Wheeler](#), 890 S.W.2d 785 (Tenn. 1994).
- 8 Am. Jur. 2d, Judgments[[WestlawNext®\(r\) Search Query](#)].
- 9 [Shuck v. Quackenbush](#), 75 Colo. 592, 227 P. 1041, 38 A.L.R. 259 (1924).

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## 21 Am. Jur. 2d Creditors' Bills § 74

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

#### IV. Practice and Procedure

##### E. Judgment and Relief

## § 74. Appropriation and sale of debtor's property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

Where a creditor's bill has been filed, the court has power to decree satisfaction of the sum due the plaintiff on his or her judgment, out of any personal property, money, or choses in action belonging to the defendant which may have been discovered by the proceedings.<sup>1</sup>

### Observation:

Mere potential for problems in some cases, such as serious disruption of business that might occur if a debtor's joint venture interest were to be seized outright by a creditor, for which tailored solutions are usually possible, is no reason to bar application of a reach and apply statute from the start.<sup>2</sup>

The amount due to the complainant, and for which the property is held liable, should be fixed before the sale, since otherwise a greater quantity of property may be sold than is requisite to pay the debt.<sup>3</sup> In some cases it may be necessary to meet a statutory requirement that before the property of a judgment debtor may be ordered sold to satisfy his or her debts, it must be found that the income by way of rent to accrue from all the debtor's real estate subject to judgment liens within five years will not be sufficient to extinguish such liens.<sup>4</sup> In those cases, the court should ascertain from the pleadings and proof whether the debtor's

property will rent for sufficient amount to pay the debts within the period prescribed.<sup>5</sup> Land must have a rental value in order to come within the meaning of such a statute.<sup>6</sup>

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Footnotes

- 1 [Bethlehem Fabricators v. H.D. Watts Co.](#), 286 Mass. 556, 190 N.E. 828, 93 A.L.R. 1124 (1934); [Saginaw County Sav. Bank v. Duffield](#), 157 Mich. 522, 122 N.W. 186 (1909).
- 2 [Tilcon Capaldi, Inc. v. Feldman](#), 249 F.3d 54 (1st Cir. 2001).
- 3 [Cohen v. Carroll](#), 13 Miss. 545, 5 S. & M. 545, 1846 WL 1611 (1846).
- 4 [First Nat. Bank of Northfork v. Godfrey](#), 94 W. Va. 1, 117 S.E. 680, 30 A.L.R. 1054 (1923); [Morris v. Baird](#), 72 W. Va. 1, 78 S.E. 371 (1913).
- 5 [Morris v. Baird](#), 72 W. Va. 1, 78 S.E. 371 (1913).
- 6 [Morris v. Baird](#), 72 W. Va. 1, 78 S.E. 371 (1913).

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 75

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

#### IV. Practice and Procedure

#### E. Judgment and Relief

### § 75. Personal judgment or decree

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

Inasmuch as equity acts in personam, where the person of the debtor is within its jurisdiction, it may compel appropriate action on the part of the debtor to render its decree effective; therefore, where a patent or copyright is subjected to the claim of a creditor, the court may require the debtor to execute such assignment as may be necessary to vest title in the purchaser or purchasers, in conformity with the patent or copyright laws, and appoint a trustee to execute an assignment if the patentee should not conform.<sup>1</sup>

Where the suit is brought to subject assets in the hands of third persons to the payment of a judgment debt, a personal judgment will not be entered against them for the full amount of the creditor's claim in the absence of anything to show that they had become personally liable therefore.<sup>2</sup>

A judgment fixing the amount of the indebtedness of the defendant to the plaintiff and appropriating the former's property to the payment thereof may be granted since the proceeding is one in rem or in the nature of a proceeding in rem.<sup>3</sup> Moreover, a judgment otherwise valid as a judgment in rem is not rendered invalid because it purports to establish a personal liability.<sup>4</sup>

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#### Footnotes

<sup>1</sup> [Ager v. Murray](#), 105 U.S. 126, 26 L. Ed. 942, 1881 WL 19730 (1881); [Stephens v. Cady](#), 55 U.S. 528, 14 How. 528, 14 L. Ed. 528, 1852 WL 6761 (1852).

<sup>2</sup> [Dunphy v. Kleinsmith](#), 78 U.S. 610, 20 L. Ed. 223, 1870 WL 12738 (1870) (overruled in part on other grounds by, [Hornbuckle v. Toombs](#), 85 U.S. 648, 21 L. Ed. 966, 1873 WL 16070 (1873)).

<sup>3</sup> § 2.

4 [Shuck v. Quackenbush, 75 Colo. 592, 227 P. 1041, 38 A.L.R. 259 \(1924\).](#)

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 76

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

#### IV. Practice and Procedure

##### E. Judgment and Relief

## § 76. Attorney's fees and other allowances

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

In creditors' suits the courts frequently apply the rule<sup>1</sup> that in the exercise of their equitable jurisdiction courts may allow a creditor, whose services have brought funds or property into court to be administered for the satisfaction of his or her claim and the claims of other creditors of the same class, reasonable compensation for the creditor and his or her attorneys to be paid from such funds or out of the proceeds of such property.<sup>2</sup> The fact that the services in maintaining a creditor's suit did not result in increasing the amount of funds distributable among all creditors, but merely increased the funds available to the class of creditors for the benefit of which the suit was brought, does not preclude the allowance of a fee out of the funds available for distribution to that class.<sup>3</sup> An attorney's fee may be allowed out of the fund reached by a creditor's bill instituted for, and resulting in, the benefit of all the creditors of an insolvent, notwithstanding that the existence of claims prior to that of the creditor bringing the suit precludes him or her from sharing in it as a distributee.<sup>4</sup> However, an allowance cannot be made from funds going to creditors having priority who are not benefited by the suit.<sup>5</sup> Moreover, the application of one creditor for the allowance of an attorney's fee will be denied if the services of the attorney are antagonistic to the other creditors, notwithstanding that he or she may have preserved or increased the fund to be administered.<sup>6</sup>

Allowances may be made to a creditor bringing a creditor's suit only out of the funds or property brought into, and administered by, the court, for the benefit of other creditors of the same class.<sup>7</sup> Allowances are made for the successful maintenance of a creditor's bill from the fund distributable among the creditors, and not from the surplus available after payment of all debts of the defendant.<sup>8</sup>

The amount to be allowed is peculiarly within the discretion of the chancellor or judge and, in the absence of any showing of an abuse of discretion, the allowance made must be affirmed.<sup>9</sup>

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Footnotes

- 1 Am. Jur. 2d, Costs[WestlawNext®(r) Search Query].
- 2 Nolte v. Hudson Nav. Co., 47 F.2d 166 (C.C.A. 2d Cir. 1931); Gibbs v. Blackwelder, 346 F.2d 943, 9 Fed. R. Serv. 2d 37A.22, Case 1 (4th Cir. 1965).
- 3 Nolte v. Hudson Nav. Co., 47 F.2d 166 (C.C.A. 2d Cir. 1931).
- 4 Campbell v. Provident Sav. & Loan Soc., 61 S.W. 1090 (Tenn. Ch. App. 1900).
- 5 Muskegon Boiler Works v. Tennessee Valley Iron & R. Co., 274 F. 836 (M.D. Tenn. 1921).
- 6 Ford v. Gilbert, 44 Or. 259, 75 P. 138 (1904).
- 7 Morgan v. Grass Fibre Pulp & Paper Corporation, 11 F.2d 431 (S.D. Fla. 1926).
- 8 Huff v. Bidwell, 195 F. 430 (C.C.A. 5th Cir. 1912); German Nat. Ins. Co. v. Virginia State Ins. Co., 108 Va. 393, 61 S.E. 870 (1908).
- 9 Central Trust Co. of New York v. U.S. Light & Heating Co., 233 F. 420 (C.C.A. 2d Cir. 1916).

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End of Document

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## 21 Am. Jur. 2d Creditors' Bills § 77

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.

### IV. Practice and Procedure

### E. Judgment and Relief

## § 77. Ancillary remedies of injunction and receivership

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

### Forms

Am. Jur. Pleading and Practice Forms, Creditors' Bills—Forms Regarding Complaints and Petitions[[WestlawNext®\(r\)](#)  
[Search Query](#)]

In order to make a creditor's suit effective, equity will, where necessary, employ the ancillary remedies of injunction and the appointment of a receiver,<sup>1</sup> although the lien of the creditor is usually held to be acquired by the commencement of the suit, and not by the issuance of an injunction or the order for a receiver or his appointment.<sup>2</sup> An injunction to prevent defendants from paying nonresident creditors, granted in a creditor's suit, sufficiently asserts dominion and control over the indebtedness to subject it to final judgment appointing a receiver.<sup>3</sup> No injunction will, however, be issued in a creditor's suit, unless a necessity therefor to save the rights of the creditor is apparent.<sup>4</sup>

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### Footnotes

- <sup>1</sup> [Saginaw County Sav. Bank v. Duffield](#), 157 Mich. 522, 122 N.W. 186 (1909); [Berger v. Loomis](#), 169 Or. 575, 131 P.2d 211, 144 A.L.R. 636 (1942).
- <sup>2</sup> [§ 80](#).

3 [Bragg v. Gaynor](#), 85 Wis. 468, 55 N.W. 919 (1893).

4 [Portland Bldg. Ass'n v. Creamer](#), 34 N.J. Eq. 107, 1881 WL 8412 (Ch. 1881).

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## 21 Am. Jur. 2d Creditors' Bills § 78

American Jurisprudence, Second Edition | May 2021 Update

### Creditors' Bills

John A. Gebauer, J.D.


#### IV. Practice and Procedure

##### E. Judgment and Relief

## § 78. Ancillary remedies of injunction and receivership —Appointment, title, and powers of receiver

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, Debtor and Creditor 11

The appointment of a receiver in proceedings upon a creditor's bill is a usual practice and is almost a matter of course where the object of the bill is to reach personal assets.<sup>1</sup> Where a creditor's suit is brought to subject the proceeds of certain bills and accounts receivable of the debtor, the court may appoint a receiver for the purpose of collecting such bills and accounts receivable.<sup>2</sup> Moreover, the court has power, if necessary, to appoint a receiver of the share of a distributee of a decedent's estate in the interest of a creditor, and to require the executor or administrator to account to the receiver for such share.<sup>3</sup>

Even without an assignment by the debtor to the receiver appointed in a creditor's suit, the assets of the debtor, choses in action, and so forth, vest in such receiver by virtue of the order appointing him or her.<sup>4</sup> In contemplation of law, the title vests in the court when the action is commenced and passes as from that date to the receiver.<sup>5</sup> The court will not let the possession of the receiver, which is that of the court itself, be disturbed by anyone without its permission and one so interfering may be proceeded against as for a contempt.<sup>6</sup>

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#### Footnotes

- <sup>1</sup> [Bruton v. Tearle](#), 7 Cal. 2d 48, 59 P.2d 953, 106 A.L.R. 580 (1936).  
Generally, as to when creditors may obtain the appointment of a receiver, see Am. Jur. 2d, Receivers[[WestlawNext®\(r\) Search Query](#)].
- <sup>2</sup> [Fry v. Smith](#), 61 Ohio St. 276, 55 N.E. 826 (1899).
- <sup>3</sup> [Fremont Farmers Union Co-op. Ass'n v. Markussen](#), 136 Neb. 567, 286 N.W. 784, 123 A.L.R. 1287 (1939).

- 4                      Saginaw County Sav. Bank v. Duffield, 157 Mich. 522, 122 N.W. 186 (1909).  
5                      King v. Gooding, 130 Ill. 102, 22 N.E. 533 (1889).  
6                      Saginaw County Sav. Bank v. Duffield, 157 Mich. 522, 122 N.W. 186 (1909).

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